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In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1925

No. 8[redacted] 246

PACIFIC AMERICAN FISHERIES,
Petitioner,
vs.
TERRITORY OF ALASKA,
Respondent.

PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit
AND BRIEF IN SUPPORT THEREOF.

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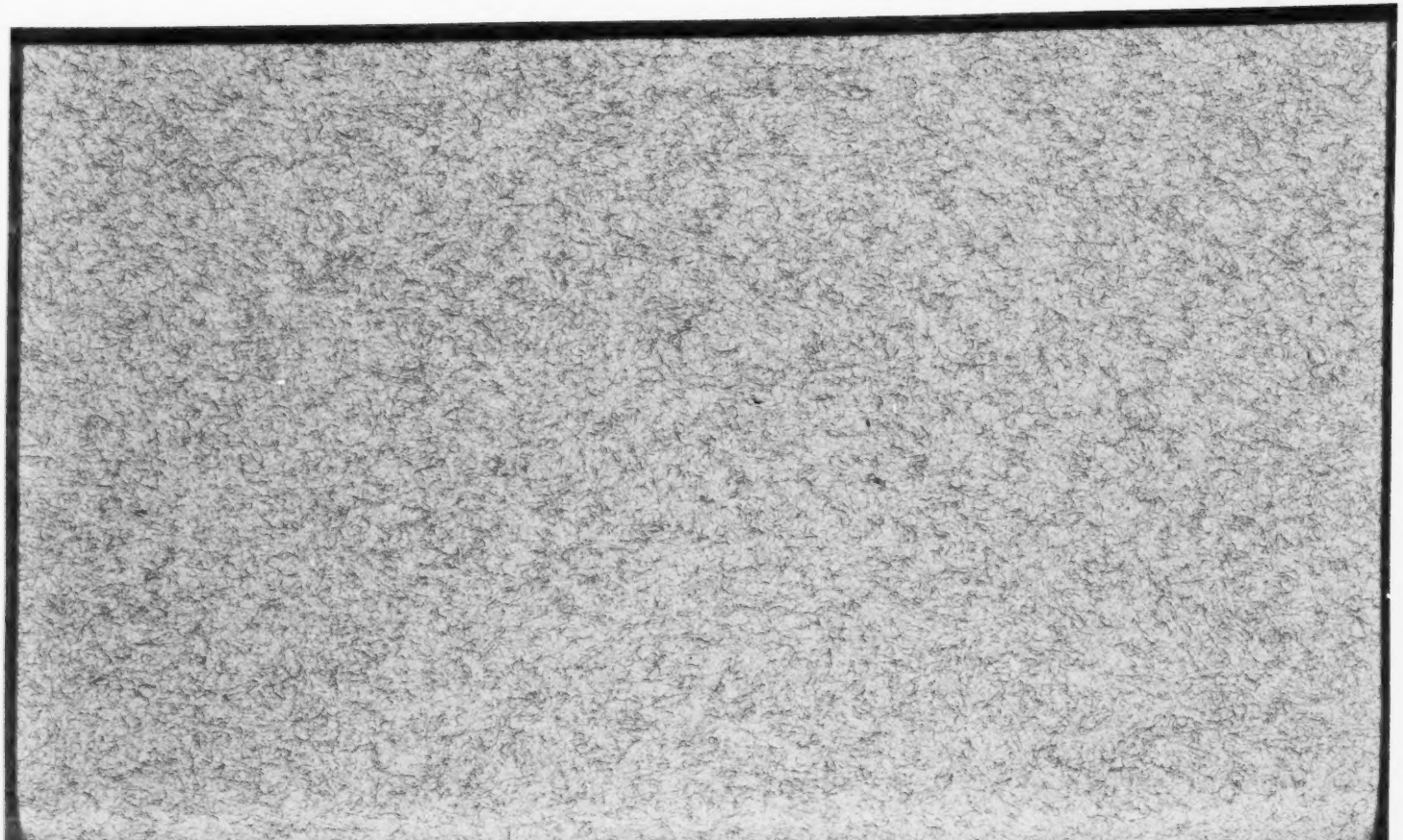

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PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit.

Pacific American Fisheries, a corporation organized under the laws of the State of Maine, petitioner herein, respectfully shows the court as follows:

PROCEEDINGS AND DECISION OF THE LOWER COURTS.

The respondent, Territory of Alaska, recovered judgment April 23, 1924, for $9,752.52 and costs (Trans. 77).

Upon writ of error to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed on October 20, 1924, and a rehearing denied on November 24, 1924.

The case comes up upon the complaint, demurrer thereto and answer to the complaint. The complaint is in four counts and alleges generally that the company had at four separate canneries in Alaska canned or packed a certain number of cases of salmon upon which there was due as taxes the sum of $9,437.89 with interest. The demurrer and answer challenged the validity of subdivisions c, e and h of Section 8 of an Act of the Legislature of the Territory of Alaska designated as Chapter 101 of the Laws of 1923 (Session Laws of Alaska, 1923, p. 269). Said Section 8 is as follows:

> "8th: Fisheries.
>
> "(a) Clam canneries, three (3) cents per case.
>
> "(b) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.
>
> "(c) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(d) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(e) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(f) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.

"(g) Salteries: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild-cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(h) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(i) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(j) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(k) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term "fishermen" shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924."

The grounds of such challenge were, as far as concerns this petition, succinctly, the following:

1. That the said act, while in form a taxing measure, is in truth one to regulate the catching and canning of salmon contrary to the provisions of Section 3 of the Organic Act of Alaska (37 Statutes at Large 512), which withhold from the Territorial Legislature the right to alter, amend, modify and repeal laws of Congress in force in Alaska relating to the game, fish and fur-seal laws.

2. That the said act is violative of the provisions of the Fourteenth Amendment of the Constitution of the United States in that it denies to the defendant the equal protection of the laws and also abridges the immunities and privileges of citizens of the United States.

3. That the said act does not define what is meant by the word "cannery" and that it is impossible to determine whether the said term refers to a building or to a plant.

The question here presented is concerned only with the validity of subdivisions c, e and h of Section 8. The company has paid the normal tax of 10¢ per case imposed by Subdivision b of said section, but has not paid the additional tax provided by the above other subdivisions.

On June 26, 1906, Congress enacted a statute for the protection and regulation of salmon in Alaska (34 Stat. at Large 478), and this act was in force in 1923 when the law here attacked was passed by the Alaska Legislature (*Auk Bay Salmon Canning Company v. United States,* 300 Fed. 907).

The authorities upon these points are cited in the brief in support of this petition.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of this court, in accordance with its practice, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding it to certify to this court a complete transcript of the record of all proceedings in that court in this cause; and that the transcript herewith presented be ordered to stand as a return to said writ for that purpose; that this court assume jurisdiction of said cause, and to hear and determine the same; and that upon such hearing the judgments of the Circuit Court of Appeals for the Ninth Circuit, and the District Court of the United States for the Territory of Alaska, may be reversed, and

that such orders may be entered and process issued by this court as may be necessary for this purpose.

Dated, San Francisco,
January 7, 1925.

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In the Supreme Court
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OCTOBER TERM, 1924

No.

PACIFIC AMERICAN FISHERIES, *Petitioner,*

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TERRITORY OF ALASKA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI
To the Circuit Court of Appeals for the Ninth Circuit.

I.
THE ADDITIONAL TAX IS A REGULATION OF THE CATCHING OF SALMON AND THEREFORE VIOLATIVE OF SECTION 3 OF THE ORGANIC ACT OF ALASKA.

Said Section 3 of the Organic Act of Alaska contains the following proviso:

> "Provided, That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other

> general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It should at the outset be noted that the Circuit Court of Appeals in its opinion expressly stated that this question was a close one, saying (Trans. 103):

> "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy, and may be so exercised as to render any attempt at regulation useless and abortive. *The question presented by the record in this case is, in our opinion, close to the border line*, but we are not prepared to say that the territory has exceeded the limits of its taxing power as heretofore defined by the courts" (italics ours).

The court below also expressly stated that this act was intended to "discriminate in favor of small canneries and against the large ones" (Trans. 104).

The attorney for the territory in his brief below stated (page 11 Brief for Defendant in Error):

> "The tax in question is in a measure regulatory, but that, as we have seen, does not render it void."

His argument there was that the act, although partially at least regulatory, was nevertheless valid because concerned with the *canning* and not the *catching* of salmon. On this point the court below said (Trans. 101):

> "We have no doubt that the business of catching and canning the fish constituted but one business, which business the legislature of the Territory was expressly authorized to tax by the organic act."

The regulatory character of the act is shown by the following characteristics:

1. The additional tax is graduated *upward* upon *volume* alone. This feature distinguishes the act from any other revenue measure heretofore passed. A tax which is imposed in good faith as a revenue measure is never graduated upward as is this tax, and furthermore is based upon *profits* or *income* net or gross as is the Federal Income Tax.

The act in question exacts licenses from some twenty-four different occupations or lines of business. "Fisheries" are named as the Eighth subdivision, thus being classified separately from other lines of business such as "salteries", "cold storage plants", "laundries", "meat markets", "mining", etc. The tax, of course, does not fall upon a fishery, saltery, etc., simply as property or as an ad valorem tax, nor could it do so, nor would such a tax be

valid since it would not be based upon any assessment or valuation of such properties. It falls upon the person, firm or corporation who conducts these plants. Assuming that the tax may properly differentiate *as between these general classes,* it must nevertheless bear equally upon all persons, firms or corporations within a particular class. In the case of the fisheries alone is a second classification attempted; based not upon the character or amount of the business done, but upon *the number of canneries* where the business is carried on. The inequality which bears upon salmon canners so engaged in this same line of business and packing the same character of fish is demonstrable from the terms of the act. Thus, if we take the case of three packers, A, B and C, who each pack 100,000 cases of the same kind of salmon, but who operate respectively 1, 2 and 3 canneries, the additional tax or surtax would be as follows:

A, who operates one cannery with an output of 100,000 cases, must pay:

15,000 cases at 5¢	$ 750.00
15,000 cases at 10¢	1,500.00
10,000 cases at 15¢	1,500.00
50,000 cases at 20¢	10,000.00
Total	$13,750.00

for the whole pack.

B, who operates two canneries with an output of 50,000 cases each, must pay $3,750.00 per cannery, or $7,500.00 for the whole pack.

C, who operates three canneries with an output of 33,333 cases each, must pay for each cannery $1,583.33, or $4,749.99 for the whole pack.

Yet these respective packs are the same in amount and have identically the same market value.

If the legislature had sought revenue only, it could easily have attained this object by increasing the *general* rate of 10¢ per case provided by Subdivision b of Section 8 or increasing the income tax of all salmon companies provided by Subdivision f. The history of the legislation by the Territory on this subject is that beginning in 1913 (Session Laws 1913, page 107) a tax of 7¢ per case on sock-eye and king salmon and ½¢ per case on humpback, cohoe or chum salmon was established. At each session of the legislature thereafter this rate was changed. In 1915 it was reduced to 4¢ per case on kings and reds or sock-eyes, 2¢ per case on medium reds, and 1¢ per case on all others (page 185).* In 1917 the rate was fixed at 4½¢ per case on kings and reds or sock-eyes, 2½¢ per case on medium reds and 2¢ per case on all others (page 202). In 1919 the rate was fixed as 5½¢ per case on kings, reds or sock-eyes; 3½¢ per case on medium reds; and 3¢ per case on all others, but a tax on the net annual income was added (page 91). In 1921 the rate was changed to 7¢ per case on kings and reds or sock-eyes, 3½¢ on medium reds and 3¢ on all others. The income tax feature was retained (page 99).

Thus, that portion of the act of 1923 here attacked for the first time departs from the method of taxa-

* This reference and others to the Alaskan Laws refer to the page of the Session Laws of Alaska for the appropriate year.

tion theretofore adopted by the legislature and attempts to discriminate between a large cannery and a small one through the method of a graduated volume tax. The larger the pack in any one cannery, the higher the additional tax. Only one conclusion can be reached from this change in the legislative method. The legislature was not by this additional tax trying to raise money; it was trying to stop the industry or at least to regulate it.

2. The tax on fish traps, found in Subdivision h, had the same effect. As the statute stood in 1921, a tax of $200.00 per annum was levied on each fish trap (p. 99). In 1923 the tax on traps remained the same, but an additional $2.00 per thousand was imposed upon all fish caught in any one trap in excess of 100,000 (p. 272). Here the act discloses that the object was to discourage a large catch in any single trap by the imposition of a financial burden, which becomes prohibitive as the number of fish caught in any one trap increases.

3. At this same Session of 1923 the legislature passed a closed season law (176). It attempted to establish a closed season for salmon in the waters of Alaska for a period of approximately twenty days during each summer. This act was considered by the court in the *Auk Bay* case, 300 Fed. 907, and declared invalid, the court saying (910):

> "We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial legislature was to alter, amend and to some extent

repeal the acts of Congress relating to the same subject and was within the prohibition of the Organic Act."

It is apparent that the legislature at its session of 1923 attempted a determined assault on Section 3 of the Organic Act. By the closed season law it made a direct attack and by this so-called occupational or excise tax law it has attacked on the flank. Both of these statutes were declared by the legislature to be emergency measures, becoming effective immediately upon their passage. When taken in connection with the allegations of the answer to the effect that members of the same legislature openly stated that the purpose of the graduated tax was to *regulate the catching of salmon,* the passage of this invalid closed season law is significant.

4. The exemption of chums from the surtax is also significant, the only tax here levied being a flat rate of 3¢ per case, the same as provided in the 1921 statute. It is clear that the legislature regarded chums as being a less valuable fish than the varieties subjected to the surtax, and less subject to extermination, and that therefore no additional restrictions upon their catch was necessary.

5. The act requires each cannery to pay 1% of its net annual income (page 271), no allowance being made for income derived from activities of the company without Alaska. The income tax clause is as follows:

"'In addition to the above tax, salmon canneries shall pay one per cent of their net annual

> income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.' "

It is significant that *no industry other than mining is required by the statute to pay any sort of an income tax directly or indirectly.* Even mining, which is subject to the payment of an income tax that is likewise discriminatory, is required only to pay an income tax which is graduated downward. Much may be said against the validity of an income tax which is based upon the net proceeds of a company doing an interstate business, where no allowance is made for that proportion of the income accruing outside the state (*State v. Frear,* 148 Wis. 456, 134 N. W. 673). But such a question is not at issue here because this action has been brought by the Attorney General solely for the purpose of recovering from the plaintiff in error the graduated tax on salmon which he claims to be due. But whether the income provision is constitutional or not, its inclusion in the statute is again the clearest sort of evidence that the Legislature intended to impose upon salmon canneries sufficient restrictions to make certain that the canning of fish, and consequently the catching of salmon, would be greatly reduced.

6. The revenue raised by this statute alone is grossly in excess of the needs of the Territory.

Circumstances which we have heretofore pointed out as showing the real nature of the statute have all been taken either from the face of the act itself or from a comparison of the act with other statutory enactments of the Territorial Legislature. However, as this case comes up upon demurrer to the answer, all of the allegations of the answer must be taken as true.

St. Louis v. Knapp Co., 104 U. S. 658;
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 223.

One of these allegations is to the effect that if the tax in question be collected it will result in a revenue grossly in excess of the total appropriations of the Legislature and in excess of the needs of the Territory; in other words, that the Legislature was not looking at all or at least primarily at the revenue side of the bill, but simply trying to regulate the fishing industry of Alaska, a subject matter wholly within the jurisdiction of Congress and of the various federal agencies. The particular portion of the answer containing this allegation is found in subdivision h thereof at page 41 of the Transcript of Record.

Subdivision (h) of the answer alleges that a revenue grossly in excess of any possible revenue necessary for the maintenance of the Territorial Government will result; that the total revenue from this statute will result in a sum of not less than

$863,423.13 per annum; that the appropriations provided by the Legislature for the *two* years 1923-1924 total the sum of $1,411,200.82, leaving an excess of more than $350,000.00 over and above the revenue needed by the Territory or appropriated. The answer then alleges that no public money may be legally expended without a previous appropriation and that there will be other sources of revenue accruing to the Territorial Government on taxes imposed upon other lines of business. The foregoing facts cannot be brushed aside. They are one more link in the chain of strong cumulative evidence going to show that so far as the 8th section of the statute in question is concerned, it is a fish law and not a revenue law.

That the excessiveness of revenue obtained from the operation of a statute is to be considered in determining its constitutionality was held in the case of *Commonwealth v. Alden Coal Co.,* 251 Pa. 134, 96 Atl. 246, 250. In that case the State of Pennsylvania imposed a tax of 2½% upon the value of anthracite coal mined. No tax of any kind was imposed upon bituminous coal. In holding that this tax was unconstitutional, one of the circumstances strongly relied upon by the court was that it would produce more money than the State needed. In this connection the court said:

> "* * * that the tax imposed by the act upon the anthracite exclusively would, if enforced, amount to several million dollars annually, and the one-half thereof returned to the counties in trust for the several boroughs, cities, and town-

ships thereof according to population, would in some cases give to the municipality more than the entire tax raised therein for municipal purposes, and in a great many cases would approximate the total amount raised for municipal purposes, and would bestow upon many boroughs and townships which do not now and never have contained a pound of coal deposited within their limits large sums of money annually for the conduct of their municipal affairs, or for such municipal expenditures as such municipalities may see fit to make.

"Keeping in mind that the one great purpose of legislative classification is to avoid the inequalities that would necessarily result from subjecting all the members or subjects of a natural class to uniformity of rule, is it not apparent that, whatever the purpose of this act, its certain effect would be not only an unjust and unwarranted discrimination in levying the tax, but a like unjust and unwarranted discrimination in its disbursement? Here we have a tax imposed yielding a revenue twice as large in amount as the state's requirements, and, for some undisclosed reason, the one-half of the total paid into the state treasury is directed to be paid over to the treasurers of the nine anthracite producing counties to be divided among the several municipalities therein. * * *"

It may be said that the *Alden* case has been overruled by *Heisler v. Thomas Colliery Co.*, 260 U. S. 245. After the decision in the *Alden* case the Legislature of Pennsylvania again passed a statute similar in many respects to that held unconstitutional in the *Alden* case, except that the amount of the tax was cut in half. The constitutionality of the new act was upheld by the

Supreme Court of that state and the judgment affirmed by the United States Supreme Court in the *Heisler* case. But it is to be noted that the excessiveness of the tax was not an issue in the second case, and rightly so, since the tax rate had been cut in two and there were no allegations in the complaint that the result of the operation of the tax would be to produce an excessive amount of revenue. The *Heisler* case, is, therefore, in no sense in conflict with the *Alden* case so far as the effect of an excessive revenue upon the validity of a tax is concerned.

7. It was the intent and purpose of the Legislature to pass an act regulating the catch of fish and not for revenue purposes.

Subdivision (h) of the third affirmative defense contains the following allegation:

> "In this connection defendant alleges that the Legislature in passing this law well knew that the tax would produce a revenue largely in excess of governmental needs, and that the purpose of the Legislature in imposing such an excessive tax was to regulate the taking of salmon from the territorial waters and to discourage the taking thereof by large concerns such as the defendant."

In subdivision (i) of the third affirmative defense it is alleged:

> "That the purpose of increasing said taxes as aforesaid was to discourage the packers from packing in excess of 10,000 cases of salmon of the varieties of reds, kings and sockeyes, and in excess of 25,000 cases of cohoes, medium reds

and pinks, and to regulate the business of said packers and this defendant in the production of their canneries."

In subdivision (j) of the third affirmative defense there is the following allegation:

> "That said license fees, taxes or charges—will result in a revenue grossly in excess of any possible need of said Territory and that such fact was well known by said Legislature at the time said Acts were enacted; that it was at the time of the passage of said Chapter 101, Alaska Session Laws 1923, openly claimed by the Legislature that the purpose of the passage of said Chapter of the Laws of Alaska 1923 was to regulate the fishing and catching of salmon."

The foregoing allegations which stand here undenied show three things as to the intent of the Legislature in enacting this statute:

1. That it was the intent of the Legislature to regulate fisheries and not to obtain revenue;
2. That the Legislature knew that the revenue realized would be grossly in excess of the needs of the Territory;
3. That the members of the Legislature openly stated before the passage of the statute that their knowledge and their intention was as above stated.

8. All of the circumstances connected with this case tend to show that the Legislature intended to prohibit and to penalize rather than to tax for revenue.

The upward graduated feature of the tax, the income tax clause, the passage of the closed

season law and the exemption of chums from the surtax are all matters appearing either on the face of the act itself or are to be discovered by a comparison of the act with other statutes of Alaska. So far as these matters are concerned there can be no question that they not only show the purpose of the Legislature in passing the tax, but they are pertinent to disclose such purpose.

In the case of *Elmer v. Wallace*, 275 Fed. 86, the court had under consideration the validity of a tax imposed by the State of Alabama upon fresh shrimps. This tax was quadrupled in the case of shrimp taken in and shipped outside the state. The court held that despite the characterization of the act as a revenue measure, this must be regarded as a restriction upon the taking of shrimps, and particularly upon the shipping of shrimps in interstate commerce and shows that the courts always seek the true nature of the statute regardless of the name it bears.

It will probably be claimed that the excessiveness of the revenue raised and the statements contained in the answer with regard to the intent of the Legislature may not be relied upon to show the actual purpose of the legislation, as it has been stated in some cases that the nature of legislation is to be discovered upon its face and not by reference to a characterization of such purpose. Such a contention as this is contained in *Alaska Fish Co. v. Smith*, 255 U. S. 44. That case involved the legality

of a tax in the guise of a license fee of $2.00 per barrel and $2.00 per ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. It was there urged that the tax was prohibitory and was, therefore, a disguised attempt to pass a fish law. This tax is easily distinguishable from the one at bar by reason of the fact that it was not in any way graduated upward, nor did the statute purport on its face to do anything other than raise revenue. The court refused to look to the allegations of the complaint in order to determine the intent of the Legislature. There is nothing in the case to show that the revenue would be grossly or at all in excess of the needs of the Territory or that the members of the Legislature openly asserted at the time of the passage of the act that they intended to regulate fisheries. The *Smith* case is hereafter referred to at length.

Furthermore, any intimations contained in the case with regard to the unimportance of the intent of the Legislature in passing an act must be regarded as having been overruled by the child labor tax case *Bailey v. Drexel Furniture Co.*, 259 U. S. 20. That case holds unconstitutional the latest attempt on the part of Congress to pass a Federal Child Labor Bill. The bill took the form of a so-called excise tax of 10% on the entire net profits of any mine, mill, etc., where children under the age of fourteen years were employed. The court first held that the case was similar in principle to *Hammer v. Dagenhart*, 247 U. S. 251, which had decided that a

federal statute prohibiting the transportation through interstate commerce of goods made at a factory in which children were employed was unconstitutional, there being nothing inherently objectionable in the goods so transported.

This court then held that there is a certain point where a so-called excise tax, because of the manifest purpose of the legislative body, becomes a penalty. As such it may not be upheld where the legislative body did not have both the power to levy an actual excise tax and the right directly and openly to regulate or prohibit the activity in question.

The language in this case is so pertinent to the discussion here that we shall set forth some of it at length (at pp. 36, 37):

> "* * * If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer *solely* from its heavy burden that the act intends a prohibition instead of a tax. * * *
>
> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number

of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. *Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.* Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

In distinguishing the case of *Veazie Bank v. Fenno,* 8 Wall 533, which case involved the constitutionality of the federal statute putting a 10% tax upon the circulation of the notes of State banks, Mr. Chief Justice Taft said (at p. 41):

> "It will be observed that the sole objection to the tax there was its excessive character. *Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all.* There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax." (Italics ours.)

The Chief Justice also distinguished *McCray v. United States,* 195 U. S. 27. That was a case in which Congress increased the tax upon yellow oleomargarine from 2¢ to 10¢ per pound, leaving the tax on white oleomargarine at 1¼¢ a pound as it had stood before. It was held by the Supreme Court that this tax was constitutional. Mr. Chief Justice Taft says (at p. 42):

> "* * * It was the same principle as that applied in the Veazie Bank Case. This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specications of a regulation of a state concern and

> business with a heavy exaction to promote the efficacy of such regulation."

Another case which looks to the legislative intent is *Alaska Pacific Fisheries v. Territory of Alaska,* 236 Fed. 52, 55, in which this court said:

> "It is plain, we think, that our conclusion should be arrived at by assuming that *the great object* of the Legislative Act of April 29, 1915, quoted above was to create revenue, and that in its scheme of license taxes the Legislature had in mind provision for the expense of administration of the Territory." (Italics ours.)

We submit that in the case at bar as in the Child Labor Tax Case there are disclosed many detailed specifications of the attempted regulation of a federal concern and business with a heavy exaction to promote the efficacy of such regulation.

As to the question of the court looking behind the form and language of tax statutes when deciding as to their validity see:

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362;

Collins v. New Hampshire, 171 U. S. 30, 34.

II.

THE CLASSIFICATION IS ARBITRARY AND UNREASONABLE AND THEREFORE VOID.

It is undenied that a taxing power may for the purposes of taxation make certain classifications, but this court has held that such classifications

" 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560;

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150.

The question here involved may be briefly stated as follows: "May a Legislature *which has no*

power of regulation impose a discriminatory tax so that a large manufacturer will *simply because he is such large dealer*, be taxed more per unit upon his output than the small manufacturer?" The right of classification must bear some reasonable relation to the object to be attained. In the case of the Alaskan Legislature, this object was and could be simply the collection of revenue. It could not go beyond that, since it had no power of regulation. This case, therefore, presents to this court the question of whether or not a large manufacturer may be taxed more per unit than a small manufacturer without regard to his profits or his net or gross returns or to his regulation.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, this court held that a statute of Kansas, which imposed certain restrictions upon stock yards within the State, and which stock yards for the preceding twelve months should have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, was invalid, the court being unanimous upon the point that the statute was in violation of the Fourteenth Amendment, in that it in fact applied only to stock yards within the limits of Kansas City and not to other companies engaged in like business in Kansas, and that therefore it denied to such companies the equal protection of the laws.

The argument which was used by the Attorney General for Kansas in this case, was practically

identical with the arguments used by the Attorney General for Alaska in the instant case. They both asserted that the public had a greater interest in the business of a large stock yard or cannery than it had in the business of smaller ones, and that the Legislature could and indeed should correct that inequity by levying such a tax that the two would become equal.

It is impossible to approach the consideration of this question without realizing its importance. It is only an unusual situation that permits it to be considered, but nevertheless that situation is now before this court.

We are not here concerned with the power of regulation, since Congress has withheld that power from the local Legislature. As said in the opinion in this case, the power to tax is the power to destroy. The amount of the tax is not to be considered. The court must approach the situation as if the Legislature of Alaska had imposed a tax of $100 per case, or any other impossible amount, for all salmon packed in a single cannery over and above 10,000 cases.

It matters not at all as to the amount of the tax. If the Legislature can discriminate in any degree so as to impose a tax upon the output of a cannery *dependent upon the size of that cannery,* then it has the right to extend that power to the X limit.

The question here presented is not that which the court had before it in considering the federal in-

come tax statute (*Brushaber v. Union Pac. R. R. Co.,* 240 U. S. 1), because that statute was concededly passed for the purpose only of *securing revenue,* and the classification there made had only to do with the question of revenue. But from the standpoint of revenue, a distinction as between a large cannery and a small one has no "reasonable and just relation to the act in respect to which the classification is proposed."

This court has decided that a federal income tax may be graduated upon the net profits of the taxpayer. A man whose net profit for the year is $10,000 may be taxed more per dollar than one whose net profit is less than $10,000, but the basis of this classification is one of *profit* or *net earnings.* It has nothing to do with the *volume* of business because the man who packed 100,000 cases of salmon, or who manufactures 1,000,000 tons of steel, may make less money than the one who puts up 20,000 cases, or who manufactures but 100,000 tons. *From a revenue standpoint a classification must be based upon revenue per se.* So far as our investigation has gone, this statute stands by itself. We have been unable to find an act of any legislature which has attempted to classify upward a tax solely upon the ground of volume of business without regard to the profit or net returns received from that business.

Incidents of this fact are numerous. For example, in the *Cotting* case, supra, it was held that the Legislature of Kansas had no right to impose special restrictions upon stock yards graded upon the num-

ber of cattle or hogs or sheep which they annually received.

In the case of *State ex rel. Wyatt v. Ashbrook,* 154 Mo. 375, 55 S. W. 627 (the department store case), it was held that no distinction may be made based upon the *place* where a business is conducted. In that case the law provided that a mercantile establishment should pay more if its business was conducted in one store than the same establishment would have to pay if the same business was transacted in several stores. The court held that such a tax was an unwarranted discrimination against department stores. The same argument is applicable here. The unreasonableness of the surtax provisions in the case at bar is apparent when it is remembered that the discrimination is based not upon geographic location but solely upon the number of the canneries engaged in the pack.

The principle laid down in the *Department Store* case has been followed in California in *In re Dees,* 46 Cal. App. 656 and 50 Cal. App. 11, in holding invalid a law placing a high tax upon the privilege of scalping tickets. In that case the court said (pp. 660, 661):

> "In considering the particular enactment the fact that it purports to be a revenue measure is not conclusive. 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under the solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the

limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the constitution.' (Mugler v. Kansas, 123 U. S. 661, (31 L. Ed. 205, 8 Sup. Ct. Rep. 297, see, also, Rose's U. S. Notes); Ex parte Whitwell, 98 Cal. 78, 79, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870).) *With what greater force does this reasoning apply in a case where the enactment purports to be a revenue measure, while it is in substance a prohibitive statute, or at least a regulatory one, as this so plainly appears to be.*

"Considered as a revenue measure, the section under consideration, if it provides for any tax, provides for one upon single sales and not upon a business. It further is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted. It cannot be upheld as a revenue measure for these reasons. (Merced County v. Helm, 102 Cal. 159-166, (36 Pac. 399); Ex parte Richardson, 170 Cal. 68, (148 Pac. 213).) As a police measure it is an unwarranted interference with the liberty of citizens of the State and the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. (Ex parte Whitwell, 98 Cal. 73, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870); People v. Quarg, 149 Cal. 79-81, (117 Am. St. Rep. 115, 9 Ann. Cas. 747, 5 L. R. A. (N. S.) 183, 84 Pac. 766).)" (Italics ours.)

The case of *City of Los Angeles v. Lankershim*, 160 Cal. 800, is also a good one because it points out

that a discrimination is arbitrary and unreasonable if based simply upon size of establishment. The statute in question imposed a certain tax per room per year upon every person operating an office building containing more than thirty rooms. The court said (pp. 802, 803):

> "Surely, a man who owns a building with thirty office rooms for rent is engaged in no different 'occupation' from that of the man alongside of him owning an office building with twenty-nine office rooms to rent, and if, as in the case of this ordinance, a tax is to be levied at the rate of a dollar a room upon the person engaged in the 'occupation' of renting office rooms no reason appears or is shown why, belonging to the same class as they do, the man who rents five office rooms should not pay five dollars if the man who rents fifty is compelled to pay fifty dollars. The contention that, for the purposes of taxation, the municipal council may draw a class line at thirty rooms and declare those who rent thirty rooms and over are engaged in an occupation, while those who rent less than thirty rooms are not engaged in the same occupation, is purely fanciful as would be plainly exemplified if the ordinance imposed a tax upon those who rent from one to thirty rooms and relieved from the tax those who rented over thirty rooms. Yet, if this asserted ground of classification is substantial, the city council would have the power to do precisely this thing.
>
> * * * * * *
>
> "The well-settled rule that 'every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business' means that a court will be zealous in its search for any substantial ground for upholding such an

> ordinance when attacked; but it does not mean that the court must shut its ears to reason and declare in every case that *because* an ordinance has been passed there must be valid reasons for its existence."

The following cases hold that the characteristics of the respective classes created must be germane to the main legislative purpose.

Ex parte Franks, 52 Cal. 606;
Ex parte Richardson, 170 Cal. 68;
City of Seattle v. Dencker, 58 Wash. 501, 108 Pac. 1086.

It cannot be said that the surtax bears equally upon all who are engaged "in the business of packing more than 10,000 reds at one cannery." *There is no such business as that,* any more than there is a business consisting of the operation of an office building containing more than thirty rooms. A person runs a cannery or maintains an office building (he does not run a cannery of 10,000 cases—or an office building of 30 rooms) and no distinction may be made in either case for the purpose of taxation so far as volume is concerned.

This surtax does not even have the virtue of a reasonable ratio of increase. The rate per case upon reds packed in one cannery where no more than 10,000 are packed is 10 cents per case. If 25,000 are packed in that cannery the rate is 13 cents per case. If 40,000 are packed the rate is 15 6/10 cents per case. If 50,000 cases are packed the rate is 17½ cents per case and if 100,000 cases

are packed the rate is 23 7/10 cents per case. This ratio of increase is neither proportionate nor reasonable. The only thing that can be said about it is that it is very heavy.

Another illustration of the unfairness of the tax is the one already given, viz., where A, B and C each pack 100,000 cases of the same kind of salmon but where A operates only one cannery, B two, and C three. Under these circumstances, A pays a total tax of $13,750.00, B pays $7,500.00 and C $4,749.99. This shows very clearly that the tax, though graduated, has no relation to the *value* of the pack and especially no relation to *profit* realized by the packer. In other words, there is no fund, as in the case of the Federal Income Tax, upon which the increasingly higher tax rate operates.

Such a tax does not rest upon substantial differences "which bear a just and proper relation to the attempted classification." By the same token, it violates the principle of *Truax v. Raich*, 239 U. S. 33, where a statute of Arizona was held invalid which prohibited any employer of more than five workers from employing a force more than 20% of which would not be qualified electors. And in *Tanner v. Little*, 240 U. S. 369, 383, the court well said:

> "* * * The Statute was held void because there was no authority to deal with that at which the legislation was aimed and this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if

> such authority exists, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the Legislature."

A strong case in our behalf is *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298. In that case the license tax in question imposed a tax upon one, two, three and four-horse wagons, the graduations on the one, two and three-horse wagons being, so far as could be observed, reasonable, whereas the tax upon four-horse wagons was out of all proportion. In the opinion in that case the court readily conceded the proposition that the reasonableness of a classification for the purpose of license taxes is ordinarily something for the legislature to determine but it went on to say that where a classification was manifestly unequal and unreasonable it must fall. The court said:

> *"It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class but it cannot unjustly discriminate between the subdivisions so made."* (Italics ours.)

The allegation contained in the answer to the effect that the statute in question contains no definition of a "cannery" is not merely a technical objection to the phraseology of a statute the meaning of which is reasonably clear. It is an objection which goes to the very root of the tax. As a corporation must pay a different surtax depending upon whether

its salmon are packed in one cannery or in two, a clear definition of the word "cannery" is absolutely essential. (*Gould v. Gould*, 245 U. S. 151.) Does it mean a particular building in which a portion of the canning machinery may be operated or does it mean the plant in any particular location? To anyone familiar with the salmon canning industry, the ambiguity of this term is obvious. For example, if we assume that on the left bank of the Karluk River, a stream not over 30 feet wide, there are located a number of cannery buildings and on the right bank another group of buildings, are these altogether one cannery, two canneries or more? This case comes up upon demurrer to the answer and it is alleged in the answer that the word "cannery" is uncertain in its meaning and that it is impossible to determine whether said term refers to a building or to a plant.

III.

PUBLIC NATURE OF THE QUESTION INVOLVED.

The correct solution of the question presented by this case is of paramount importance to the Territory of Alaska, and also to all of the fishery companies there engaged, for ever since 1913 these questions have come up, and continually there has arisen, the question of the power of the territorial legislature to indirectly control the fishing industry by a statute such as the one now under consideration.

It seems obvious that Congress intended to retain for itself the control of this fishing industry. May the legislature indirectly take this control through the medium of an excise tax? The decision in the *Auk Bay Canning* case runs parallel with the decision in this case. It is of importance to all parties concerned that the limitations and rights imposed upon and conferred by the Organic act be clearly understood.

The question here presented is furthermore of public importance because it presents primarily the question as to whether or not a large manufacturer may be taxed more per unit than a small manufacturer, regardless of any profit the one or the other may realize from his business.

If we are correct in our assumption, the *size* of a business has no legitimate relation to the *profit* or *deficit* of that business.

Your petitioner urges that the question here involved must necessarily at sometime be passed upon by this court. The petitioner had the statutory right to take a direct appeal or sue out a writ of error from the judgment of the district court to this court. This was the procedure adopted in the *Haavik* and *Smith* cases, supra. While necessarily a denial of this petition must conclude this case so far as this present petitioner is concerned, nevertheless other canning companies similarly circumstanced will have the right and undoubtedly will bring this question directly to this court by the above method. It is respectfully submitted,

therefore, that, on account of the public nature of the question involved, it should be passed upon in the present case, thus removing an uncertainty which must prevail until the above direct appeal can be taken.

IV.

THE DECISIONS IN ALASKA FISH CO. V. SMITH, 255 U. S. 44, ALASKA PACIFIC FISHERIES V. ALASKA, 236 FED. 52, AND HAAVIK V. ALASKA PACKERS ASSN., 263 U. S. 510, ARE NOT CONTROLLING HERE.

It is said in the opinion of the court below (Trans. 102) that:

> "It cannot, therefore, be now held, as plaintiff in error urges should be done, that the purpose of the legislature in imposing the license taxes here complained of was a mere *regulation* of the canning business without overruling the views of this court heretofore expressed, which we are not disposed to do."

In none of the cases cited was an act similar to the one here attacked under consideration. In the *Smith* case this court had under review that portion of the Session Laws of 1917 (page 203) imposing a tax of $2.00 per barrel and $2.00 a ton respectively upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. This was a flat tax. There was no evidence of an attempt to regulate other than appeared from the mere fact that a tax was levied.

The situation would be identical with the one presented if petitioner here had attacked *the normal tax of 10¢ per case* imposed by the Act of 1923.

But your petitioner has recognized that the above decisions have definitely settled this question and it has accordingly paid the normal tax.

The *Alaska Pacific Fisheries* case also was concerned only with a general tax imposed at the session of 1913. There was no graduated provision in this act. It was merely held that the imposition of a tax *as such* was not a fish law opposed to the Organic Act.

The *Haavik* case held that an annual poll tax and license fee imposed only on non-resident fishermen in Alaska was not opposed to the Organic Act. The only question presented was as to whether or not a poll tax was necessarily a fish law. Thus the question presented was similar to that decided in the two last cited cases.

In the present case your petitioner asserts that the statute is regulatory by reason of especial features, which can have no relation to the question of revenue but must if they have any meaning control the catching and canning of salmon and that such was the legislative intent.

The decisions in these cited cases also largely turn upon that provision in the Organic Act permitting the legislature to impose additional taxes

and licenses. We are conceding in this brief that the legislature has such power, but our contention is that the evidence here of regulation is of quite a different character than that which was considered or could have been considered in the above cited cases.

Dated, San Francisco,
January 7, 1925.

Respectfully submitted,
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Warren Gregory,
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H. L. Faulkner,
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Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of January, 1925.

_____

United States Attorney.

_____

Assistant United States Attorney,
Attorneys for Respondent.

Office Supreme Court, U. S.
FILED
NOV 23 1925
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 246

PACIFIC AMERICAN FISHERIES, *Plaintiff in Error*,

vs.

TERRITORY OF ALASKA, *Defendant in Error*.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 844.

PACIFIC AMERICAN FISHERIES, *Plaintiff in Error,*
vs.
TERRITORY OF ALASKA, *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

When this case came to the Circuit Court of Appeals, the case of Aux Bay Canning Company vs. United States was also before that Court. In this case the only question was the validity of an Act of the Territorial Legislature (Chapter 95 Session Laws of 1923, page 176) entitled "An Act to supplement the fish laws of the United States applicable to Alaska, to conserve the salmon supply of Alaska, to provide for closed seasons for salmon fishing and for other purposes and declaring an emergency." This statute is printed in full in the Appendix to Respondent's brief page 47.

As said in the opinion holding this law invalid because opposed to the Organic Act "it created a distinction which did not exist in the law enacted by Congress—a distinction between those who fish for commercial purposes and those

who fish for other purposes" (vid Section 1) "as well as for a longer closed season—over a greater area and increased the penalties for violation." 300 Fed. Rep. 907.

Thus the change attempted was not alone in enlarging the closed season as claimed by defendant in error here.

The Aux case brought before the Court in a very direct way the question of the control of the territory over *all* fishing regulations since the Act there considered provided (Section 4) "This Act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska or any Act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and Acts of Congress shall be and remain in full force and effect. The purpose of this Act is not to alter, amend, modify or repeal any of such laws, but to provide for further and additional regulations of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof and this Act shall be construed so as to carry out the intention herein expressed and not otherwise."

The plaintiff in error here had assumed that the decision in the Aux case settled the question to the extent that if a Territorial Act be in fact a "fish law" it is invalid, but since counsel for the Territory has here urged that that decision is erroneous (brief page 6 and page 19) and has frankly maintained that the territory has still control over the fisheries (Brief pp. 4-207), we here restate the substance of the argument there made.

I.

THE ACT OF CONGRESS OF JUNE 26, 1906 (34 Stats. 478) WAS INTENDED TO COVER THE WHOLE FIELD OF FISHERY REGULATION IN ALASKA.

"Section 1 of this act provides for a license tax upon the business of manufacturing fish products;

section 2 contains lengthy and detailed provisions for encouraging the operation of private fish hatcheries and an exemption from taxation in proportion to the fish hatched and liberated; section 3 makes it unlawful to erect any structures at certain points in the waters of Alaska where such obstruction would prevent the ascent of salmon to the sqawning grounds. The Secretary of Commerce is further given authority to remove any such unlawful obstructions; section 4 makes it unlawful to operate any fishing appliances across or within a certain distance of any salmon stream. It also makes it unlawful to operate a seine within one hundred yards of any other fishing appliance or to install a trap within a certain distance of any other fishing appliance; section 5 provides that in certain waters of Alaska it shall be unlawful to fish except with rod, spear or gaff

> 'from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following',

and also to fish at night in certain streams. It also provides

> 'That throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, etc. ';

section 6 provides that the Secretary of Commerce may set aside any streams or lakes for spawning grounds in which fish may be limited or entirely prohibited. It also provides that the Secretary of Commerce may establish closed seasons or *limit or prohibit fishing entirely for one year or more* within a stream or within a certain distance of the mouth of the stream when in his judgment the number of salmon being taken from said stream is larger than its natural production. It likewise provides that such powers shall be exercised only after all persons interested have been given notice and a hearing, and further, that any order so made shall not be effective before the year after that in which it is made. It further provides that such

limitation shall not apply to persons who keep the streams in which they fish fully stocked by artificial means; section 7 makes it unlawful to can salmon more than forty-eight hours after it has been caught; section 8 makes it unlawful wantonly to waste or destroy salmon or other food fish; section 9 makes it unlawful to misbrand any can of fish by misrepresenting its contents; section 10 provides for 'detailed annual reports' to the Secretary of Commerce covering all facts in connection with the operation of any salmon cannery or other fishing establishment; section 11 provides

> 'that the catching or killing, except with rod, spear or gaff of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this act';

section 12 provides for employees of the Secretary of Commerce to investigate and inspect fishing establishments; section 13 provides penalties for violations of the act and for the forfeiture of apparatus used in violation of the Act. The penalty is not exceeding $1,000 or imprisonment for not more than ninety days, or both, and also a further fine of not more than $250 per day for a violation of section 4; section 14 provides for the venue of actions, section 15 repeals inconsistent laws and section 16 provides for the taking effect of the act immediately."

This Act is given in the appendix and was passed six years before the passage of the Ogranic Act and it is still in force as amended by the Act of June 6, 1924.

II.

THIS AMENDED ACT DEMONSTRATES THAT CONGRESS UP TO THE PRESENT TIME HAS ALWAYS RETAINED THE FULL CONTROL OF FISHERY REGULATIONS APPLICABLE TO ALASKA.

The title and first section of the Act of June 6, 1924 (43 Stat. 4647) is as follows:

> "AN ACT FOR THE PROTECTION OF THE FISHERIES OF ALASKA, AND FOR OTHER PURPOSES.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be use therein; (b) *limit the catch of fish to be taken from any area;* (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given; Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that

no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder." (Italics here and elsewhere ours.)

The later Act is as stated an *amendment* to the Act of June 26, 1906, sections 3, 4 and 5 of that Act being specifically amended and sections 6 and 13 repealed. Sections 2, 7, 8, 9, 10, 11, 12, 14, 15 and 16 of the earlier Act are still in effect as stated in Department Circular No. 251 (Eleventh Edition) of the Bureau of Fisheries, Department of Commerce issued December 2, 1924.

Section 8 of the Act of June 6, 1924, quoted by counsel for the Territory on pages 19 and 20 of his brief *adds* nothing to the powers of the Territorial Legislature previously possessed by it. If it has any effect, it is that the power to "impose additional taxes or licenses" is the *only* right of the Legislature which Congress recognized in fishery control.

III.

THE POWER OF CONGRESS TO LEGISLATE ON TERRITORIAL MATTERS IS PARAMOUNT.

Late Corporation of the Church of Jesus Christ of Latter Day Saints vs. United States, 136 U. S. 1
Boyd vs. Nebraska, 143 U. S. 135
Board of Public Utility Commissioners vs. Ynchausti & Co., 251 U. S. 401

IV.

WHEN CONGRESS ACTS IN SUCH A WAY AS TO MANIFEST A PURPOSE TO EXERCISE ITS CONCEDED AUTHORITY THE REGULATING POWER OF THE STATE OR TERRITORY CEASES TO EXIST.

Adams Express Co. vs. Croninger, 226 U. S. 491
Missouri Kansas and Texas R. R. vs. Harriman, 227 U. S. 657
Atchison & Topeka Ry. vs. Harold, 241 U. S. 371
St. Louis Iron Mountain & Southern Ry. vs. Edwards, 227 U. S. 265

The foregoing cases dealt with State regulations which were additional to but not in terms inconsistent with congressional legislation. The following hold that the States have no power to add to or supplement the Acts of Congress in such relation.

Prigg vs. Pennsylvania, 16 Peters 539
Erie Railroad Company vs. New York, 233 U. S. 671
Charleston & Western Carolina R. R. Co. vs. Varnville Furniture Co., 237 U. S. 597
Southern Railway Company vs. Railroad Commission of Indiana 236 U. S. 439

The rule is the same where Congress (as here) has empowered an Executive or Administrative Body to promulgate regulations.

Actiesselskahet Ingrid vs. Central Railroad, 216 Fed. 72

The rule applies with equal or greater force to territories.

Betsch vs. Umphrey, 270 Fed. 45
Territory vs. Lee, 2 Montana 124
Allen vs. Reed, 10 Okla. 105, 60 Pac. 782

The above is of course made doubly certain by the specific denial of jurisdiction over "game, fish and fur seal laws."

V.

FISHING AND CANNING ARE ONE BUSINESS.

The Act (Chapter 101, Laws of 1923) here assailed provides that any person etc. prosecuting the following *lines of business* shall obtain a license for the respective lines of business, viz.

8th—*Fisheries.*

(c) *On a pack of kings, reds and sockeyes* counted together at any one cannery, etc.

The only tax for operating a *cannery* as such is imposed by subdivisions (a) and (b) which is not in issue here since it has been paid (Record pp. 3-5-7-9)

It was said in State vs. Hume (Oregon), 95 Pacific Rep. 208:

> "Fish must be caught before they can be canned and any legislation that tends to restrict the canning of salmon necessarily limits the number of such fish that will be taken for the chief demand for salmon is for canning purposes and a statute that circumscribes the demand necessarily diminishes the supply."

VI.

THE DEBATES IN CONGRESS.

The debate on the fisheries commences on page 5279 of the Congressional Record and concludes at page 6288 (Vol. 48, Part 6 of the Record Session of the Sixty-second Congress).

The portion set out in counsel's brief is but a small part of the whole discussion:

It should be explained in this connection that section 3 as originally proposed by Mr. Wickersham provided that the Legislature should not alter, amend, modify and repeal the customs, internal revenue, postal and other general laws. The same provision was by amendment made applicable to the game and fish laws in consequence of the debate.

The following was also said:

> Mr. Mann. "Under the provisions of this Bill would the Territorial Legislature have any jurisdiction over the matter of game and fisheries?
>
> Mr. Wickersham. Undoubtedly, except as it might come in conflict with an Act of Congress.
>
> Mr. Mann. Does not the Bill expressly provide that if it does come in conflict with the Act of Congress, the Territorial Legislature may repeal the Act of Congress?
>
> Mr. Wickersham. Not at all.
>
> Mr. Mann. I am very glad to hear the gentleman's opinion about that, although it is very plainly in the bill." (p. 5279.)
>
> Mr. Butler. " * * * Is there anything anywhere in this proposed Act that would authorize the Legislature to change the laws in regard to conservation *so as to interfere with the policies of the Government in any way in that direction?*
>
> Mr. Wickersham. *I think not.*" (p. 5284.)
>
> Mr. Wickersham. "I think no citizen of Alaska has been convicted of a violation of the game laws.
>
> Mr. Mann. I have no doubt that is true. I doubt whether it is very practical to convict a citizen of

> Alaska under ordinary conditions in the courts up there, for the same reason if they had power to change the game laws. I doubt whether it would be possible to have a law preserving the game of Alaska." (p. 5285.)

As said by the Circuit Court of Appeals in the Aux case where this same point was raised, "Nothing that was said, however, is authoritative or of such a character as to relieve this Court of the responsibility of construing the organic Act according to its terms" citing;

> United States vs. Union Pacific R. R., 91 U. S. 72
> United States vs. Freight Assn., 166 U. S. 290

Other cases to the same effect are—
Downes vs. Bidwell 182 U. S. 244.
Aldridge vs. Williams 3 Howard 9.
Maxwell vs. Don 176 U. S. 581.

The utmost that may be said for this discussion is that the members were not all of the same opinion—

Respectfully submitted,

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Blair S. Shuman,
Attorneys for Plaintiff in Error.

APPENDIX.

Act of June 26, 1906.

Chap. 3547—An Act for the protection and regulation of the fisheries of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirteenth, eighteen hundred and sixty-seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes therefore and thereon pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the Act of March third, eighteen hundred and ninety-nine, entitled "An Act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district," and amendments thereto.

SEC. 2. That the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries operated in Alaska shall be exempt from all license fees and taxation of every nature at the rate of ten cases of canned salmon to every one thousand red or king salmon fry liberated, upon the following conditions:

That the Secretary of Commerce and Labor may from time to time, and on the application of the hatchery owner shall, within a reasonable time thereafter, cause such private hatcheries to be inspected for the purpose of determining the character of their operations, efficiency, and productiveness, and if he approve the same shall cause notice of such approval to be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein any such hatchery of the and shall also notify the owners of such hatchery of the action taken by him. The owner, agent, officer, or superintendent of any hatchery the effectiveness and productive-

ness of which has been approved as above provided shall, between the thirtieth day of June and the thirty-first day of December of each year, make proof of the number of salmon fry liberated during the twelve months immediately preceding the thirtieth day of June, by a written statement under oath. Such proof shall be filed in the office of the clerk or deputy clerk of the United States district court of the division of the district of Alaska wherein such hatchery is located, and when so filed shall entitle the respective hatchery owners to the exemption as herein provided; and a false oath as to the number of salmon fry liberated shall be deemed perjury and subject the offender to all the pains and penalties thereof. Duplicates of such statements shall also be filed with the Secretary of Commerce and Labor. It shall be the duty of such clerk or deputy clerk in whose office the approval and proof heretofore provided for are filed to forthwith issue to the hatchery owner, causing such proofs to be filed, certificates which shall not be transferable and of such denominations as said owner may request (no certificate to cover fewer than one thousand fry), covering in the aggregate the number of fry so proved to have been liberated; and such certificates may be used at any time by the person, company, corporation, or association to whom issued for the payment pro tanto of any license fees or taxes upon or against or on account of any catch or pack of salmon made by them in Alaska; and it shall be the duty of all public officials charged with the duty of collecting or receiving such license fees or taxes to accept such certificates in lieu of money in payment of all license fees or taxes upon or against the pack of canned salmon at the ratio of one thousand fry for each ten cases of salmon. No hatchery owner shall obtain the rebates from the output of any hatchery to which he might otherwise be entitled under this Act unless the efficiency of said hatchery has first been approved by the Secretary of Commerce and Labor in the manner herein provided for.

SEC. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in

width, the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed.

SEC. 4. That it shall be unlawful to lay or set any net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.

SEC. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following, or to fish for, or catch, or kill in any manner or by any appliances except by rod, spear, or gaff, any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed the gate, mouth, or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the "heart" of such traps on each side next to the "pot" shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

SEC. 6. That the Secretary of Commerce and Labor may, in his discretion, set aside any streams or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgment, the re-

sults of fishing operations in any stream, or off the mouth thereof, indicate that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish close seasons or to limit or prohibit fishing entirely for one year or more within such stream or within five hundred yards of the mouth thereof, so as to permit salmon to increase: *Provided, however,* That such power shall be exercised only after all persons interested shall be given a hearing, of which due notice must be given by publication; and where the interested parties are known to the Department they shall be personally notified by a notice mailed not less than thirty days previous to such hearing. No order made under this section shall be effective before the next calendar year after same is made: *And provided further,* That such limitations and prohibitions shall not apply to those engaged in catching salmon who keep such streams fully stocked with salmon by artificial propagation.

SEC. 7. That it shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed.

SEC. 8. That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska.

SEC. 9. That it shall be unlawful for any person, company, or corporation canning, salting, or curing fish of any species in Alaska to use any label, brand, or trade-mark which shall tend to misrepresent the contents of any package of fish offered for sale: *Provided,* That the use of the terms "red," "medium red," "pink," "chum," and so forth, as applied to the various species of Pacific salmon under present trade usages shall not be deemed in conflict with the provisions of this Act when used to designate salmon of those known species.

SEC. 10. That every person, company, and corporation engaged in catching, curing, or in any manner utilizing fishery products, or in operating fish hatcheries in Alaska, shall make detailed annual reports thereof to the Secretary of Commerce and Labor, on blanks furnished by him, covering all such facts as may be required with respect thereto for the information of the Department. Such reports shall be sworn to by the superintendent, manager, or other per-

son having knowledge of the facts, a separate blank form being used for each establishment in cases where more than one cannery, saltery, or other establishment is conducted by a person, company, or corporation, and the same shall be forwarded to the department at the close of the fishing season and not later than December fifteenth of each year.

SEC. 11. That the catching or killing, except with rod, spear, or gaff, of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions if this Act, and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this Act.

SEC. 12. That to enforce the provisions of this Act and such regulations as he may establish in pursuance thereof, the Secretary of Commerce and Labor is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries now provided by law, from the officers and employees of the Department of Commerce and Labor, a force adequate to the performance of all work required for the proper investigation, inspection, and regulation of the Alaskan fisheries and hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of this Act.

SEC. 13. That any person, company, corporation, or association violating any provision of this Act or any regulation established in pursuance thereof shall, upon conviction thereof, be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for a term of not more than ninety days, or by both such fine and imprisonment, at the discretion of the court; and in case of the violation of any of the provisions of section four of this Act and conviction thereof a further fine of not more than two hundred and fifty dollars per diem may, at the discretion of the court, be imposed for each day such obstruction is maintained. And every vessel or other apparatus or equipment used or employed in violation of any provision of this Act, or of any regulation made thereunder, may be seized by order of the Secretary of Commerce and Labor, and shall

be held subject to the payment of such fine or fines as may be imposed.

SEC. 14. That the violation of any provision of this Act may be prosecuted in any district court of Alaska or any district court of the United States in the States of California, Oregon, or Washington. And it shall be the duty of the Secretary of Commerce and Labor to enforce the provisions of this Act and the rules and regulations made thereunder. And it shall be the duty of the district attorney to whom any violation is reported by any agent or representative of the Department of Commerce and Labor to institute proceedings necessary to carry out the provisions of this Act.

SEC. 15. That all Acts or parts of Acts inconsistent with the provisions of this Act are, so far as inconsistent, hereby repealed.

SEC. 16. That this Act shall take effect and be in force from and after its passage.

Approved, June 26, 1906.

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 246

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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No.

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,
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Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This is an action brought by the Territory of Alaska to recover from the plaintiff in error, a corporation engaged in the business of canning and packing salmon in Alaska, the sum of nine thousand four hundred thirty-seven and 89/100 dollars ($9,437.89) with interest and costs, as being the alleged portion of a tax due and unpaid. The tax was imposed by a statute enacted by the Legislature of Alaska in 1923. (Chapter 101, Session Laws of Alaska, 1923, pages 269-276 of Statute. That portion of the act which is

pertinent to this case is set forth in the Appendix to this brief.) This statute is an amendment of Chapter 31 of the Territorial Laws of 1921. (Page 269 of Statute.)

The particular portions of the Act of 1923 here under consideration are subdivisions c, d, e and f of Section 8. (Page 271 of Statute.) The statute purports to levy an excise tax upon the prosecution of certain designated lines of business or profession in the Territory, practically every field of endeavor being covered. The amount of the tax is fixed arbitrarily in each instance. Section 8, which imposes a tax upon fisheries, is made up of three component parts. The first of these is a flat tax of a certain amount per case on all salmon packed, the per centum of the tax varying with the variety of salmon. (Subds. b, d, f.) The second is a surtax graduated upward and based upon the number of cases packed in a particular cannery, certain varieties of salmon not being covered by this surtax. (Subds. c, e.) The third is an income tax of one (1) per cent of the net annual income of the cannery.

In this case the plaintiff in error has paid the flat tax but has declined to pay the surtax and the action was instituted by the Attorney General of the Territory to compel its payment.

The pleadings in the case are the complaint, a demurrer thereto upon general and special grounds, an answer to the complaint with a plea in abatement, a demurrer to the answer and plea in abatement on general grounds. The demurrers to the answer and plea were sustained. Thereupon both plaintiff and defendant below moved for judgment upon the plead-

ings and an order was made denying the motion of defendant for such judgment and granting the motion of plaintiff. The judgment was entered on April 23, 1924.

Plaintiff in error here claims:

a. That the act in question is in truth and fact an attempt to regulate the fisheries and therefore contrary not only to the Organic Act but also to the license issued by the Department of Commerce of the United States to plaintiff in error permitting it to take salmon from the territorial waters of Alaska in accordance with the terms and conditions of such license.

b. That the purpose of the said surtax was to discourage packers from packing in excess of ten thousand cases of salmon in any one cannery, and that the regulatory character of the act is further shown by the tax on fish traps (subdivision h), which is graded by the number of fish caught in any one trap. (Page 44.)

c. That the attempted arbitrary classification of the tax on fisheries by the number of cases packed in each cannery is violative of the provisions of the Fourteenth Amendment of the Constitution of the United States and also of the Fifth Amendment of the Constitution, and that a greater liability for taxation is thereby imposed upon a firm or corporation which conducts its business in a single salmon cannery than upon a firm or corporation engaged in the same business which secures its pack from more than one cannery.

d. That the act in question does not define what is meant by the word "cannery" and that therefore it is impossible to determine whether the said word applies to a single building in which the canning operations may be carried on, or to the canning plant of a particular locality, which may include several cannery buildings.

II.

SPECIFICATION OF ERRORS RELIED UPON.

Plaintiff in error in this brief relies upon the assignments of error (Trans. 79) to the effect that the court erred:

1. In overruling the demurrer of plaintiff in error to the complaint and also the demurrers to the separate causes of action therein stated;

2. In sustaining the demurrer of the defendant in error to the first, second, third and fourth affirmative answers and defenses contained in the answer of the plaintiff in error;

3. In sustaining the demurrer of the defendant to the plea in abatement of the plaintiff in error;

4. In granting the motion of the defendant in error for a judgment upon the pleadings and in entering a judgment in favor of the defendant in error and against the plaintiff in error.

The question raised by this brief is the validity of a tax imposed by subdivisions c and e of Section 8 of the 1923 Statute above cited.

III.

BRIEF OF ARGUMENT.

1. The Additional Tax or Surtax is a Regulation of the Catching of Salmon and Therefore Violative of Section 3 of the Organic Act of Alaska.

On August 24, 1912, Congress enacted a law creating a Legislative Assembly for the Territory of Alaska, which is commonly spoken of as the Organic Act. (37 Stats. at Large 512.) This act differed fundamentally from previous acts passed by Congress with reference to other territories, since it expressly withheld from the authority of the new Territorial Legislature jurisdiction over certain important elements of general governmental control. The proviso of Section 3 is as follows:

> "Provided, That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States, *or to the game, fish and fur-seal laws* and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes', approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof; Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." (Italics here and elsewhere in this brief are ours.)

By this proviso Congress made it clear that it intended to retain jurisdiction over the excepted matters among which are the laws relating to fish.

On June 26, 1906, Congress enacted a statute for the protection and regulation of the salmon fisheries of Alaska (34 Stats. 478, Comp. St. Sections 3628-3643), and it has been directly held by the Circuit Court of Appeals for the Ninth Circuit that this Congressional Act was in full force and effect in 1923 when the Territorial Legislature passed the law now here attacked. (*Auk Bay Salmon Canning Company v. United States,* 300 Fed. 907.) By the express terms, therefore, of the Organic Act, as well as by the decision last cited, it is clear that if said subdivisions c and e of Section 8 of Chapter 101 of the Territorial Laws of 1923 is in truth and fact a "fish law," it is unenforceable as being an attempt to cover a field over which the Legislature has no jurisdiction.

It should at the outset be noted that the learned Circuit Court of Appeals in its opinion expressly stated that this question was a close one, saying (Trans. 103):

> "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy, and may be so exercised as to render any attempt at regulation useless and abortive. *The question presented by the record in this case is, in our opinion, close to the border line,* but we are not prepared to say that the territory has exceeded the limits of its taxing power as heretofore defined by the courts."

The court below also expressly stated that this act was intended to "discriminate in favor of small canneries and against the large ones." (Trans. 104.)

The attorney for the Territory in his brief below stated (page 11 Brief for Defendant in Error):

> "The tax in question is in a measure regulatory, but that, as we have seen, does not render it void."

His argument there was that the act, although partially at least regulatory, was nevertheless valid because concerned with the *canning* and not the *catching* of salmon. On this point the court below said (Trans. 101):

> "We have no doubt that the business of catching and canning the fish constituted but one business, which business the legislature of the Territory was expressly authorized to tax by the organic act."

The regulatory character of the act is shown by the following characteristics:

a. *The additional tax is graduated upward upon volume alone.* This feature distinguishes the act from any other revenue measure heretofore passed. A tax which is imposed in good faith as a revenue measure is never graduated upward as is this tax, and furthermore is based upon *profits* or *income* net or gross as is the Federal Income Tax.

The act in question exacts licenses from some twenty-one different occupations or lines of business. "Fisheries" are named as the Eighth subdivision, thus being classified separately from other lines of business such as "salteries", "cold storage plants", "laundries", "meat markets", "mining", etc. The tax, of course, does not fall upon a fishery, saltery, etc., simply as property or as an ad valorem tax, nor

could it do so, nor would such a tax be valid since it would not be based upon any assessment or valuation of such properties. It falls upon the person, firm or corporation who conducts these plants. Assuming that the tax may properly differentiate *as between these general classes,* it must nevertheless bear equally upon all persons, firms or corporations within a particular class. In the case of the fisheries alone is a second classification attempted; based not upon the character or amount of the business done, but upon *the number of canneries* where the business is carried on. The inequality which bears upon salmon canners so engaged in this same line of business and packing the same character of fish is demonstrable from the terms of the act. Thus, if we take the case of three packers, A, B and C, who each pack 100,000 cases of the same kind of salmon, but who operate respectively 1, 2 and 3 canneries, the *additional tax or surtax* would be as follows:

A, who operates one cannery with an output of 100,000 cases, must pay for the surtax:

15,000 cases at 5¢	$ 750.00
15,000 cases at 10¢	1,500.00
10,000 cases at 15¢	1,500.00
50,000 cases at 20¢	10,000.00
Total	$13,750.00

for the whole pack.

B, who operates two canneries with an output of 50,000 cases each, must pay $3,750.00 per cannery, or $7,500.00 for the whole pack.

C, who operates three canneries with an output of 33,333 cases each, must pay for each cannery $1,583.33, or $4,749.99 for the whole pack.

Yet these respective packs are the same in amount and have identically the same market value.

If the Legislature had sought revenue only, it could easily have attained this object by increasing the *general* rates per case provided by subdivisions b, d, and e of Section 8, or increasing the income tax of all salmon companies provided by subdivision f. The history of the legislation by the Territory on this subject is that beginning in 1913 (Session Laws 1913, page 107) a tax of 7¢ per case on sock-eye and king salmon and ½¢ per case on humpback, coho or chum salmon was established. At each session of the Legislature thereafter this rate was changed. In 1915 it was reduced to 4¢ per case on kings and reds or sock-eyes, 2¢ per case on medium reds, and 1¢ per case on all others. (Page 185).* In 1917 the rate was fixed at 4½¢ per case on kings and reds or sock-eyes, 2½¢ per case on medium reds and 2¢ per case on all others. (Page 202.) In 1919 the rate was fixed as 5½¢ per case on kings, reds or sock-eyes; 3½¢ per case on medium reds; and 3¢ per case on all others, but a tax on the net annual income was added. (Page 91.) In 1921 the rate was changed to 7¢ per case on kings and reds or sock-eyes, 3½¢ on medium reds and 3¢ on all others. The income tax feature was retained. (Page 99.)

Thus, that portion of the Act of 1923 here attacked for the first time departs from the method of taxation theretofore adopted by the Legislature and attempts to *discriminate between a large cannery and a*

* This reference and others to the Alaskan Laws refer to the page of the Session Laws of Alaska for the appropriate year.

small one through the method of a graduated volume tax. The larger the pack in any one cannery, the higher the additional tax. Only one conclusion can be reached from this change in the legislative method. The Legislature was not by this additional tax trying to raise money; it was trying to stop the industry or at least to regulate it.

b. *The tax on fish traps, found in subdivision h, had the same effect.* As the statute stood in 1921, a tax of $200.00 per annum was levied on each fish trap. (Page 99.) In 1923 the tax on traps remanied the same, *but an additional $2.00 per thousand was imposed upon all fish caught in any one trap in excess of 100,000.* (Page 272.) Here the act discloses that the object was to discourage a large catch in any single trap by the imposition of a financial burden, which becomes prohibitive as the number of fish caught in any one trap increases.

c. *At this same session of 1923 and on the preceding day the Legislature passed a closed season law.* (Page 176.) It attempted to establish a closed season for salmon in the waters of Alaska for a period of approximately twenty days during each summer. This act was considered by the court in the *Auk Bay* case, 300 Fed. 907, and declared invalid, the court saying (page 910):

> "We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial legislature, was to alter, amend and to some extent repeal the acts of Congress relating to the same subject and was within the prohibition of the Organic Act."

It is apparent that the Legislature at its session of 1923 attempted a determined assault on Section 3 of the Organic Act. By the closed season law it made a direct attack and by this so-called occupational or excise tax law it has attacked on the flank. Both of these statutes were declared by the Legislature to be emergency measures, becoming effective immediately upon their passage. When taken in connection with the allegations of the answer to the effect that members of the same Legislature openly stated that the purpose of the graduated tax was to *regulate the catching of salmon*, the passage of this invalid closed season law is significant.

d. *The exemption of chums (subd. f) from the surtax is also significant, the only tax here levied being a flat rate of 3¢ per case, the same as provided in the 1921 Statute.* It is clear that the Legislature regarded chums as being a less valuable fish than the varieties subjected to the surtax, and less subject to extermination, and that therefore no additional restrictions upon their catch was necessary.

e. *The act requires each cannery to pay 1% of its net annual income (page 271), no allowance being made for income derived from activities of the company without Alaska.* The income tax clause is as follows:

> "'In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of in-

terest on bonds or money borrowed except on account of other Territorial taxes paid.' "

It is significant that *no industry other than mining is required by the statute to pay any sort of an income tax directly or indirectly.* Even mining, which is subject to the payment of an income tax that is likewise discriminatory, is required only to pay an income tax which is graduated downward. Much may be said against the validity of an income tax which is based upon the net proceeds of a company doing an interstate business, where no allowance is made for that proportion of the income accruing outside the state. (*State v. Frear,* 148 Wis. 456, 134 N. W. 673.) But such a question is not at issue here because this action has been brought by the Attorney General solely for the purpose of recovering from the plaintiff in error the graduated tax on salmon which he claims to be due. But whether the income provision is constitutional or not, its inclusion in the statute is again the clearest sort of evidence that the Legislature intended to impose upon salmon canneries sufficient restrictions to make certain that the canning of fish, and consequently the catching of salmon, would be greatly reduced.

f. *The revenue raised by this statute alone is grossly in excess of the needs of the Territory.* Circumstances which have heretofore been pointed out as showing the real nature of the statute have all been taken either from the face of the act itself or from a comparison of the act with other statutory enactments of the Territorial Legislature. However,

as this case comes up upon demurrer to the answer, all of the allegations of the answer must be taken as true.

St. Louis v. Knapp Co., 104 U. S. 658;
American School of Magnetic Healing v. Mc. Annulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 223.

One of these allegations is to the effect that if the tax in question be collected it will result in a revenue grossly in excess of the total appropriations of the Legislature and in excess of the needs of the Territory; in other words, that the Legislature was not looking at all or at least primarily at the revenue side of the bill, but simply trying to regulate the fishing industry of Alaska, a subject matter wholly within the jurisdiction of Congress and of the various federal agencies. The particular portion of the answer containing this allegation is found in subdivision h thereof at page 41 of the Transcript of Record.

Subdivision (h) of the answer alleges that a revenue grossly in excess of any possible revenue necessary for the maintenance of the Territorial Government will result; that the total revenue from this statute will result in a sum of not less than $863,423.13 per annum; that the appropriations provided by the Legislature for the *two* years 1923-1924 total the sum of $1,411,200.82, leaving an excess of more than $350,000.00 over and above the revenue needed by the Territory or appropriated. The answer then alleges that no public money may be legally expended without a previous appropriation and that there will be other

sources of revenue accruing to the Territorial Government on taxes imposed upon other lines of business. The foregoing facts cannot be brushed aside. They are one more link in the chain of strong cumulative evidence going to show that so far as the 8th section of the statute in question is concerned, it is a fish law and not a revenue law.

That the excessiveness of revenue obtained from the operation of a statute is to be considered in determining its constitutionality was held in the case of *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 96 Atl. 246, 250. In that case the State of Pennsylvania imposed a tax of 2½% upon the value of anthracite coal mined. No tax of any kind was imposed upon bituminous coal. In holding that this tax was unconstitutional, one of the circumstances strongly relied upon by the court was that it would produce more money than the state needed. In this connection the court said:

> "* * * that the tax imposed by the act upon the anthracite exclusively would, if enforced, amount to several million dollars annually, and the one-half thereof returned to the counties in trust for the several boroughs, cities, and townships thereof according to population, would in some cases give to the municipality more than the entire tax raised therein for municipal purposes, and in a great many cases would approximate the total amount raised for municipal purposes, and would bestow upon many boroughs and townships which do not now and never have contained a pound of coal deposited within their limits large sums of money annually for the conduct of their municipal affairs, or for such municipal expenditures as such municipalities may see fit to make.

> "Keeping in mind that the one great purpose of legislative classification is to avoid the inequalities that would necessarily result from subjecting all the members or subjects of a natural class to uniformity of rule, is it not apparent that, whatever the purpose of this act, its certain effect would be not only an unjust and unwarranted discrimination in levying the tax, but a like unjust and unwarranted discrimination in its disbursement? Here we have a tax imposed yielding a revenue twice as large in amount as the state's requirements, and, for some undisclosed reason, the one-half of the total paid into the state treasury is directed to be paid over to the treasurers of the nine anthracite producing counties to be divided among the several municipalities therein. * * *"

It may be said that the *Alden* case has been overruled by *Heisler v. Thomas Colliery Co.*, 260 U. S. 245. After the decision in the *Alden* case the Legislature of Pennsylvania again passed a statute similar in many respects to that held unconstitutional in the *Alden* case, except that the amount of the tax was cut in half. The constitutionality of the new act was upheld by the Supreme Court of that state and the judgment affirmed by the United States Supreme Court in the *Heisler* case. But it is to be noted that the excessiveness of the tax was not an issue in the second case, and rightly so, since the tax rate had been cut in two and there were no allegations in the complaint that the result of the operation of the tax would be to produce an excessive amount of revenue. The *Heisler* case, is, therefore, in no sense in conflict with the *Alden* case so far as the effect of an excessive revenue upon the validity of a tax is concerned.

g. *It was the intent and purpose of the Legislature to pass an act regulating the catch of fish and not for revenue purposes.*

Subdivision (h) of the third affirmative defense contains the following allegation:

> "In this connection defendant alleges that the Legislature in passing this law well knew that the tax would produce a revenue largely in excess of governmental needs, and that the purpose of the Legislature in imposing such an excessive tax was to regulate the taking of salmon from the territorial waters and to discourage the taking thereof by large concerns such as the defendant."

In subdivision (i) of the third affirmative defense it is alleged:

> "That the purpose of increasing said taxes as aforesaid was to discourage the packers from packing in excess of 10,000 cases of salmon of the varieties of reds, kings and sockeyes, and in excess of 25,000 cases of cohoes, medium reds and pinks, and to regulate the business of said packers and this defendant in the production of their canneries."

In subdivision (j) of the third affirmative defense there is the following allegation:

> "That said license fees, taxes or charges—will result in a revenue grossly in excess of any possible need of said Territory and that such fact was well known by said Legislature at the time said Acts were enacted; that it was at the time of the passage of said Chapter 101, Alaska Session Laws 1923, openly claimed by the Legislature that the purpose of the passage of said Chapter of the Laws of Alaska 1923 was to regulate the fishing and catching of salmon."

The foregoing allegations which stand here undenied show three things as to the intent of the Legislature in enacting this statute:

1. That it was the intent of the Legislature to regulate fisheries and not to obtain revenue;

2. That the Legislature knew that the revenue realized would be grossly in excess of the needs of the Territory;

3. That the members of the Legislature openly stated before the passage of the statute that their knowledge and their intention was as above stated.

h. *All of the circumstances connected with this case tend to show that the Legislature intended to prohibit and to penalize rather than to tax for revenue.*

The upward graduated feature of the tax, the income tax clause, the passage of the closed season law and the exemption of chums from the surtax are all matters appearing either on the face of the act itself or are to be discovered by a comparison of the act with other statutes of Alaska. So far as these matters are concerned there can be no question that they not only show the purpose of the Legislature in passing the tax, but they are pertinent to disclose such purpose.

In the case of *Elmer v. Wallace,* 275 Fed. 86, the court had under consideration the validity of a tax imposed by the State of Alabama upon fresh shrimps. This tax was quadrupled in the case of shrimps taken in and shipped outside the state. The court held that despite the characterization of the act as a revenue measure, this must be regarded as a restriction upon the taking of shrimps, and particularly upon the

shipping of shrimps in interstate commerce and shows that the courts always seek the true nature of the statute regardless of the name it bears.

It will probably be claimed that the excessiveness of the revenue raised and the statements contained in the answer with regard to the intent of the Legislature may not be relied upon to show the actual purpose of the legislation, as it has been stated in some cases that the nature of legislation is to be discovered upon its face and not by reference to a characterization of such purpose. Such a contention as this is contained in *Alaska Fish Co. v. Smith,* 255 U. S. 44. That case involved the legality of a tax in the guise of a license fee of $2.00 per barrel and $2.00 per ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. It was there urged that the tax was prohibitory and was, therefore, a disguised attempt to pass a fish law. This tax is easily distinguishable from the one at bar by reason of the fact that it was not in any way graduated upward, nor did the statute purport on its face to do anything other than raise revenue. There is nothing in the case to show that the revenue would be grossly or at all in excess of the needs of the Territory or that the members of the Legislature openly asserted at the time of the passage of the act that they intended to regulate fisheries. The *Smith* case is hereafter referred to.

Furthermore, any intimations contained in the case with regard to the unimportance of the intent of the Legislature in passing an act must be regarded as having been overruled by the child labor tax case, *Bailey v. Drexel Furniture Co.,* 259 U. S. 20. That case holds

unconstitutional the latest attempt on the part of Congress to pass a Federal Child Labor Bill. The bill took the form of a so-called excise tax of 10% on the entire net profits of any mine, mill, etc., where children under the age of fourteen years were employed. The court first held that the case was similar in principle to *Hammer v. Dagenhart,* 247 U. S. 251, which had decided that a federal statute prohibiting the transportation through interstate commerce of goods made at a factory in which children were employed was unconstitutional, there being nothing inherently objectionable in the goods so transported.

This court then held that there is a certain point where a so-called excise tax, because of the manifest purpose of the legislative body, becomes a penalty. As such it may not be upheld where the legislative body did not have both the power to levy an actual excise tax and the right directly and openly to regulate or prohibit the activity in question.

The language in this case is so pertinent to the discussion here that we shall set forth some of it at length (at pages 36, 37):

> "* * * If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer *solely* from its heavy burden that the act intends a prohibition instead of a tax. * * *
>
> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presump-

tion of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

"The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. *Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.* Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

In distinguishing the case of *Veazie Bank v. Fenno*, 8 Wall. 533, which case involved the constitutionality of the federal statute putting a 10% tax upon the circulation of the notes of State banks, Mr. Chief Justice Taft said (at page 41):

> "It will be observed that the sole objection to the tax there was its excessive character. *Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all.* There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax."

The Chief Justice also distinguished *McCray v. United States*, 195 U. S. 27. That was a case in which Congress increased the tax upon yellow oleomargarine from 2¢ to 10¢ per pound, leaving the tax on white oleomargarine at 1¼¢ a pound as it had stood before. It was held by the Supreme Court that this tax was constitutional. Mr. Chief Justice Taft says (at page 42):

> "* * * It was the same principle as that applied in the Veazie Bank Case. This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

Another case which looks to the legislative intent is *Alaska Pacific Fisheries v. Territory of Alaska,* 236 Fed. 52, 55, in which the court said:

> "It is plain, we think, that our conclusion should be arrived at by assuming that *the great object* of the Legislative Act of April 29, 1915, quoted above was to create revenue, and that in its scheme of license taxes the Legislature had in mind provision for the expense of administration of the Territory."

We submit that in the case at bar, as in the child labor tax case there are disclosed many detailed specifications of the attempted regulation of a concern and business with a heavy exaction to promote the efficacy of such regulation.

That the court must look behind the form and language of tax statutes when deciding as to their validity see further:

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362;

Collins v. New Hampshire, 171 U. S. 30, 34.

2. The Question Involved Herein Has Not Been Decided Either Expressly or Impliedly By Previous Decisions.

In the following cases the application of the exception clause of the Organic Act in relation to salmon fisheries was considered:

Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52;

Alaska Salmon Co. v. Territory of Alaska, 236 Fed. 62;

Alaska Fish Co. v. Smith, 255 U. S. 44.

Other cases, which bear indirectly upon the same subject, are:

Haavik v. Alaska Packers Association, 263 U. S. 510;

Auk Bay Salmon Canning Co. v. United States, 300 Fed. 907.

In the *Alaska Pacific Fisheries* and the *Alaska Salmon Co.* cases was considered that portion of the Territorial Act enacted in 1915, which imposed upon fish traps a license charge of $100.00 per annum and upon salmon canneries a license charge of seven cents per case on sockeye and king salmon and one-half cent a case on humpback, cohoe, or chum salmon. It was held that the great object of the act there considered was "to create a revenue," and that it did not conflict with the Organic Act because such Organic Act contained the further proviso that the provision with holding power to pass a fish law should not "operate to prevent the Legislature from imposing other and additional taxes or licenses." It is important, however, to note that the court in the *Alaska Pacific Fisheries* case held that "if it were not for the last quoted proviso, any purported taxation by the Legislature on either fish traps or cases of canned salmon would be invalid, since it would 'alter, amend, modify or repeal' the then existing fish laws of Congress." In other words, these two decisions go no further than to hold that the authority given the Legislature to "impose other and additional taxes or licenses" overrode in the single particular of taxation the general proviso that the Legislature could not pass

any laws which would alter, amend, modify or repeal the laws of Congress relating to fish in Alaska.

The point there decided was that the *flat* tax levied by the Territorial Legislature either upon fish traps or cases of canned salmon was not invalid, although it might be in addition to similar license fees exacted by the laws of Congress. *The same question would have been presented here if, in the present case, the plaintiff in error had refused to pay the flat tax of ten cents per case imposed by subdivision b of Section 8 of the Act, adopted May 5, 1923.* But the plaintiff in error, as is disclosed by the record, has paid such flat tax and the validity of the same is in nowise involved here. Thus these decisions did not involve, nor was there discussed, the question of the validity of a Territorial Act which is in fact a regulatory and not a revenue measure. To the contrary, as noted, they rest entirely upon the proposition that the taxes imposed by the Act of 1915 were for *revenue only* without any feature of regulation and as such were permitted by the special proviso above noted.

The case of *Alaska Fish Co. v. Smith,* 255 U. S. 44, is cited in the opinion of the court below and has been previously referred to in this brief. In that case the court had for consideration the validity of a license tax of "two dollars a barrel and two dollars a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring." The precise phraseology of the act (Laws of 1917, page 203) is as follows:

> "10th: Fish-Oil-Works: Using Herring in whole or in part in the manufacture of fish-oil; two dollars per barrel.

> Fertilizer and Fish Meal Plants: Manufacturing fertilizer and Fish Meal in whole or in part from herring; two dollars per ton."

The court held in the cited case that this tax on fish-oil-works did not contravene the Organic Act. In principle its decision was precisely the same as that decided in *Alaska Pacific Fisheries v. Territory of Alaska,* supra. But it will be noted that the act proposing this license tax on fish-oil-works had no characteristic other than baldly designating the amount per barrel or per ton which should be paid by such works. *There was no attempted classification or other regulatory feature of the act other than the levying of the tax.* Thus, this and the other cited cases merely hold that a license tax, as such, without any regulatory feature, *is not a fish law* and does not contravene the Organic Act. The same is true of the *Haavik* case, in which an annual poll tax imposed on non-resident fishermen in Alaska was held valid. It was held that, inasmuch as these fishermen resided for a good part of the year in Alaska and pursued there a substantial means of livelihood, they were subject to such a tax.

A tax as such upon a case of canned salmon, a barrel of herring or a fisherman has been held by these cases insufficient to make the measure a "fish law." That is, the effect of such tax on the salmon industry is too remote to have it classified as a "fish" law, but, if there be any merit in the present writ of error before this court, it must be that the Act of 1923, departing from previous acts, did attempt to not only levy a flat tax but, by the surtax here challenged, to regulate the salmon industry. It may be quite con-

sistent with the Organic Act to increase the general tax rate on cases of canned salmon above the rate fixed by the Act of Congress, but this cannot be done if it be merely a disguised attempt to so classify the objects of the tax as to *in fact* regulate the catching of salmon.

We understand that the above cited cases have gone no further than to sustain the power of the Alaskan Legislature to impose other and additional taxes to those already imposed by Congress.

They have said that the Territorial Legislature may impose these additional taxes and that such measure is not a fish law, but they have not said that these taxes may be so classified that the inevitable result is to regulate the catching of salmon.

But the particular subdivision of the Act of 1923 here attacked is not, as we assert, a revenue measure, but one to regulate the catching of salmon. The object sought was to impose by the indirect method of taxation restrictions upon the catch in a particular stream or locality. We are not here considering the power of the Territorial Legislature to impose "other and additional taxes" to those already imposed by Congress. To the contrary, we are confining our attention to a measure which, by reason of its arbitrary classification, has, as we claim, obviously ceased to be a revenue measure and has intruded into the domain of regulation. The additional tax graded proportionately on the output of any one cannery is not "another and additional tax or license" upon the salmon catching industry in Alaska, but upon the output of

a particular cannery *as such*. It is therefore regulatory.

3. The Classification Upon Which the Surtax is Based is Arbitrary and Unreasonable and Opposed to the Due Process Clauses of the Fifth and Fourteenth Amendments.

It will not be denied that a taxing power may make classifications, particularly as they relate to excise or business taxes. But this court has said that such classifications

> " 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its

> operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."
>
> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560.

At the outset it may be made clear that we no longer consider as open the question of the effect of the due process clauses of the Fifth and Fourteenth Amendments upon uniformity of taxation. We recognize that repeated decisions of the court are that such uniformity is geographical only, and that any contention to the contrary would be futile.

Patten v. Brady, 184 U. S. 608;
Knowlton v. Moore, 178 U. S. 41;
Brushaber v. Union Pacific Railroad Co., 240 U. S. 1.

It is equally undeniable that, if a classification be reasonable, the rule requires only that the tax shall bear equally upon all members of the same class.

Clark v. Titusville, 184 U. S. 329;
Magoun v. Illinois Trust Bank, 170 U. S. 283.

Does this Alaskan surtax bear equally upon all members of the same class, viz., "fisheries"? It obviously does not.

We first invite attention to the act itself, Chapter 101 of the Laws of Alaska, 1923. It is entitled: "An Act to amend Chapter 31, Laws of 1921, being an Act entitled, 'An Act to establish a system of license taxation, to provide for the collection thereof and to provide punishment for doing business without a license,

repealing Chapter 33 of the Session Laws of 1919, and declaring an emergency'." The act thereupon proceeds to divide all lines of business subject to the license tax of Alaska into twenty-one separate classes, ranging from a tax upon attorneys-at-law, chiropractors, and doctors, who are named in subdivision 1 of Section 1, to those who operate saw-mills, who are included in subdivision 21 of said section. "Fisheries" is the 8th of these subdivisions or lines of business. The previous acts of the Legislature had adopted the same divisions or classifications and had fixed the same rate of taxation upon all those who canned the same variety of fish. They had also fixed a uniform license charge upon all fish traps regardless of the amount caught in any one particular trap.

The surtax here attacked destroys this equality.

We have already shown that a packer, who packs 100,000 cases of red salmon in one cannery, must pay a yearly surtax alone—in addition to the $10,000.00 imposed by the normal tax—of $13,750.00; whereas the packer of the same sized pack of red salmon in two canneries must pay only $7,500.00, and in three canneries $4,749.99. The cannery man, who can put up his pack of 100,000 cases in one cannery, must pay nearly three times as much as one who requires three canneries to make the same pack. If the pack goes to higher figures and includes one who packs 1,000,000 cases, while the number of canneries be increased to, say, ten, the inequality becomes increasingly more glaring.

The rate per case also by this surtax loses all resemblance to equality. If this surtax provision re-

main, the rate per case upon reds packed in any one cannery would be as follows: Where no more than 10,000 cases are packed, it would be 10 cents per case. If 25,000 cases are packed in that cannery, the rate would be 13 cents per case. If 40,000 were packed, the rate would be 15 6/10 cents per case. If 50,000 cases were packed, the rate would be 17½ cents per case, and if 100,000 cases were packed, the rate would be 23 7/10 cents per case.

The tax imposed by subdivision (h) of paragraph 8th on fish traps is not in fact involved directly in this action, but it may be used as an illustration of the fantastic departure from any principle of equality in taxation upon salmon packers. Prior to 1923, any operator of a fish trap was required to pay a certain sum per annum irrespective of the number of fish that might be caught in such trap, but the aforesaid subdivision (h) imposes an additional tax of $2.00 per thousand upon all fish caught in any one trap in excess of 100,000. It requires from fourteen to eighteen red salmon to the case, which consists of forty-eight one pound cans or tins. This would require approximately one million and a half fish to fill 100,000 cases. If all the fish necessary to fill 100,000 cases were caught in one trap, the surtax for the trap alone would be $3,000.00; whereas if they were caught in fifteen traps, the surtax would be nothing.

These figures place beyond the necessity of argument the fact that all salmon packers are not, under this present law, taxed alike. Although their manufactured product be identical in kind and value, the tax they are required to pay is very different. Indeed,

this inequality in taxation is expressly conceded by the court below, as well as by the attorney general. In its opinion the United States Circuit Court of Appeals said: "As admitted by the attorney for the defendant in error, they undoubtedly discriminate in favor of small canneries and against the large ones."

Does this admitted difference in the taxation burden "bear any just and proper relation to the attempted classification"? If the Territorial Legislature had any power to regulate the salmon industry or the canning business, such inequality in taxation might possibly be justified in the power of control or police power over an industry. But such control having been expressly withheld, the classification attempted must rest upon some reasonable basis of distinction. This distinction must be grounded upon *revenue*, the only subject matter in respect to which the Legislature had power to act.

From a revenue standpoint, that is, a measure which would look for its justification to the creation of funds necessary to conduct the business of the Territory, there can be no possible difference if the salmon be packed in one cannery or in twenty canneries, any more than, from a revenue standpoint, there can be any difference if a lawyer, doctor or merchant transact a given volume of business in one or more offices or stores.

The question here involved, to-wit, the right to create inequalities in the taxation burden by the artificial creation of various classes, is not a new one to this court. In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, it was exhaustively considered. There

was considered a statute of the State of Kansas of March 3, 1897, by which it was in brief provided that any stock yard within the State of Kansas, which had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, should be limited to certain charges for the driving, yarding, watering and weighing of stock. In other words, the act attempted to make an arbitrary distinction between stock yards which had the above named volume of business, and those which handled less cattle, hogs or sheep. Two great questions were considered by the court. As to the first of these questions, six of the justices believed it unnecessary to express an opinion. But as to the second, the court was unanimous. This second question was as to whether or not the Legislature of the state had the right to classify stock yards in the manner provided, so that a burden would be cast upon a stock yard which handled not less than 100 head of cattle per day, which was not cast upon a stock yard which had a less volume of business. In this connection, the court said:

> "So again exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general

interests, which interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon another.

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

It is interesting to note that the argument, which was used by the attorney general for Kansas in the above case, was practically identical with the argument now used by the attorney general for Alaska in the present case. They have both asserted that the public had a greater interest in the business of a large stock yard or cannery than it had in the business of a smaller one, and that the Legislature could and indeed should correct that inequality by levying such a tax that the two would become equal.

In *Truax v. Raich*, 239 U. S. 33, the court held that a law of Arizona, which provided that not less than eighty per cent of the employees of any company in the state should be qualified electors or native born citizens of the United States, was invalid, and that the classification attempted was not a reasonable one, since the authority to control immigration was vested solely in the Federal Government and the attempt of a state to base a classification upon a subject matter over which it had no jurisdiction was unlawful. *"That underlying the classification is the authority to deal with that to which the legislation is aimed."*

There are a number of decisions of the state courts which deal with this subject. In the case of *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627 (the department store case), it was held that no distinction could be made as to a license tax based upon the *place* where the business was conducted. In that case was considered what is known as the anti-department store law of the State of Missouri by which merchants were divided into a certain number of classes arranged as to the respective number of employees. A firm, which

employed more than fifteen persons, should pay a license of from $300.00 to $500.00, and a firm, which employed less than fifteen persons, was required to pay a lesser license fee. It was held that this law was invalid because it was not a tax which was uniform upon the same class of subjects, and was an unwarranted discrimination against a department store. The same argument is applicable here. The surtax provisions in the statute under consideration are a discrimination against the large cannery as opposed to a small one.

Other decisions of some of the states seem pertinent. In *City of Los Angeles v. Lankershim,* 160 Cal. 800, there was under consideration an ordinance of the City of Los Angeles, which required a license for every building containing more than thirty rooms, and a fee of $1.00 per year for each office room and $3.00 per year for each storeroom contained in said building. It was urged that the ordinance was an unjust discrimination between persons engaged in the same business, and that it imposed a burden upon one owner which it did not impose upon another in the same class. The court said (pages 802, 803):

> "Surely, a man who owns a building with thirty office rooms for rent is engaged in no different 'occupation' from that of a man alongside of him owning an office building with twenty-nine office rooms to rent, and if, as in the case of this ordinance, a tax is to be levied at the rate of a dollar a room upon the person engaged in the 'occupation' of renting office rooms no reason appears or is shown why, belonging to the same class as they do, the man who rents five office rooms should not pay five dollars if the man who rents fifty is compelled to pay fifty dollars. The contention

that, for the purpose of taxation, the municipal council may draw a class line at thirty rooms and declare those who rent thirty rooms and over are engaged in an occupation, while those who rent less than thirty rooms are not engaged in the same occupation, is purely fanciful as would be plainly exemplified if the ordinance imposed a tax upon those who rent from one to thirty rooms and relieved from the tax those who rented over thirty rooms. Yet, if this asserted ground of classification is substantial, the city council would have the power to do precisely this thing.

* * * * * * *

"The well-settled rule that 'every intendment is to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying on of a particular business' means that a court will be zealous in its search for any substantial ground for upholding such an ordinance when attacked; but it does not mean that the court must shut its ears to reason and declare in every case that *because* an ordinance has been passed there must be valid reasons for its existence."

The California court in *In re Dees*, 46 Cal. App. 656, and 50 Cal. App. 11, held invalid a law placing a high license tax upon one engaged in the business of scalping theater tickets. In its opinion the court said (pages 660, 661):

"In considering the particular enactment the fact that it purports to be a revenue measure is not conclusive. 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under the solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public

health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the constitution.' (Mugler v. Kansas, 123 U. S. 661, (31 L. Ed. 205, 8 Sup. Ct. Rep. 297, see, also, Roses's U. S. Notes); Ex parte Whitwell, 98 Cal. 78, 79, (35 Am. St. Rep. 152. 19 L. R. A. 727, 32 Pac. 870).) *With what greater force does this reasoning apply in a case where the enactment purports to be a revenue measure, while it is in substance a prohibitive statute, or at least a regulatory one, as this so plainly appears to be.*

Considered as a revenue measure, the section under consideration, if it provides for any tax, provides for one upon single sales and not upon a business. It further is directed to a mode of selling without consideration either of essential differences in modes or the volume of business transacted. It cannot be upheld as a revenue measure for these reasons. (Merced County v. Helm, 102 Cal. 159-166, (36 Pac. 399); Ex parte Richardson, 170 Cal. 68, (148 Pac. 213).) As a police measure it is an unwarranted interference with the liberty of citizens of the state and the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. (Ex parte Whitwell, 98 Cal. 73, (35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870); People v. Quarg, 149 Cal. 79-81, (117 Am. St. Rep. 115, 9 Ann. Cas. 747, 5 L. R. A. (N. S.) 183, 84 Pac. 766).)" (Italics ours.)

A strong case in our behalf is *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298. In that case the license tax in question imposed a tax upon one, two, three and four-horse wagons, the graduations on the one, two and three-horse wagons

being, so far as could be observed, reasonable, whereas the tax upon four-horse wagons was out of all proportion. In the opinion in that case the court readily conceded the proposition that the reasonableness of a classification for the purpose of license taxes is ordinarily something for the Legislature to determine but it went on to say that where a classification was manifestly unequal and unreasonable it must fall. The court said:

> *"It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class but it cannot unjustly discriminate between the subdivisions so made."*

That the line of demarcation between respective classes created for taxation purposes must be drawn in accordance with the main legislative purpose is held further in the following cases:

Ex parte Franks, 52 Cal. 606;

Ex parte Richardson, 170 Cal. 68;

City of Seattle v. Deucker, 58 Wash. 501, 108 Pac. 1086.

The foregoing are some instances of statutory laws which have been held violative of the Fourteenth Amendment, although such statutes were enacted by the legislatures of sovereign states which had the power of regulation as well as of taxation. They seem to present more extreme cases in favor of the law than does the Territorial Act now under consideration,

since the power of the local Legislature is not so unlimited.

In the two cases of *Rast v. Van Deman & Lewis*, 240 U. S. 342, and *Tanner v. Little*, 240 U. S. 369, the court had under consideration the validity of certain classifications created by the States of Florida and Washington respectively. The classification was sustained in each case by this court. But in each case such ruling was fundamentally placed upon the power of regulation vested in the state legislature; "it being the conception of the legislature that the regulation and restriction was in the interest of the public welfare." The opinion in *Tanner v. Little* (page 383) then proceeds:

> "But the classification which was sustained in St. Louis Coal Co. v. Illinois, 185 U. S. 203, was condemned in Truax v. Raich, 239 U. S. 33. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80% qualified electors or native born citizens of the United States or of some subdivision of such. *The statute was held void because there was no authority to deal with that at which the legislation was aimed.* And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times."

It is therefore respectfully submitted that the classification herein attempted between a large and a small cannery has no legitimate relationship to the object of the statute, which must be for revenue only.

As already said if increased revenue was desired, the flat rate or the income tax of one per cent could have been raised, thus applying to all engaged in the salmon business in Alaska. This makes the object of the classification attempted between a large and a small cannery crystal clear. The classification was created not for the purpose of increasing the revenue of the Territory but of *regulating the salmon business.* If the Territorial Legislature has power to so classify salmon canneries or traps, it is apparent that this power may be used in such a way as to completely control the output of any particular cannery or the number of fish caught in any particular locality. If this classification be legal, then it of course is within the power of the Legislature to increase or so arrange its taxation that any cannery, which sought to pack more than 10,000 cases or any other minimum number, would be entirely prohibited from so doing by the amount of the tax imposed. The court below in its opinion has recognized this apparent equivocal position when it said: "Unlimited power to tax an industry in one sovereignty seems rather inconsistent with the reservation of a power to regulate that industry by another sovereignty, as the power to tax involves the power to destroy and may be so exercised as to render any attempt at regulation useless and abortive."

As already stated, this surtax is based upon the number of cases packed in a particular cannery without regard to its value. This feature of the act differs from the other numerous subdivisions of the same chapter where the license tax is based upon the

amount of business done, e. g., bakeries, subdivision (3); cold storage plants, subdivision (9); laundries, subdivision (12); meat markets, subdivision (13); mercantile establishments, subdivision (14). The amount of this business is expressed in dollars, not in volume.

It is submitted that any classification, by which an establishment having a large output of a manufactured product is taxed more *per unit* than a similar establishment having a smaller output, is an arbitrary classification, and from the standpoint of revenue has no reasonable or legitimate reference to the object to be attained. A cannery which has an output of 100,000 cases per year may in fact yield less profit or operate at a greater loss than one with an output of 10,000 cases, yet the tax is by this act much more onerous.

4. The Act Contains No Definition of the Term "Cannery", and Hence the Attempted Classification is so Ambiguous as to Make the Provision Void.

In *Gould v. Gould,* 245 U. S. 151, this court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of citizens. Citing cases."

There is no definition of the word "cannery" in the act here considered. The tax is "on a pack of kings, reds and sockeyes counted together at any one

cannery, etc." What is meant by the word "cannery"? By subdivision e of paragraph III of the answer (Trans. 38), it was alleged that it was impossible to determine what was meant by the word "cannery", in that its meaning was so uncertain that it could not be determined whether the word referred to a building or a plant.

This is not a captious or technical objection to the act, as anyone familiar with the salmon canning business will appreciate. For example, there are some streams in Alaska which are not over thirty feet wide, and there are located on each bank of the stream a number of cannery buildings. Each of these buildings may contain what is known as a "line" of machinery. That is, the whole process of canning fish may be done in that one building. But do these two or more buildings constitute one or more "canneries"? If they are only one "cannery", then this surtax is appreciably more than if they are two or more "canneries".

We are not here concerned with any "reasonable construction", because no discretion is left to the tax collecting authorities. It is fundamental that all tax laws must be definite and precise, and that the tax collector has no discretion or power of definition or of interpretation if a term used in a taxing act is susceptible of two different meanings. This issue is directly presented by the answer and evidence should have been permitted to determine whether or not the word "cannery" is a term which has a definite and clearly understood meaning.

The judgment of the court below should be reversed.

Dated, San Francisco,
October 19, 1925.

Respectfully submitted,
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(APPENDIX FOLLOWS.)

Appendix.

Appendix

The following is Section 8 of Chapter 101 of the Session Laws of Alaska of 1923, there being in all 21 sections in said statute:

"*8th:* Fisheries.

"(a) Clam canneries, three (3) cents per case.

"(b) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.

"(c) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(d) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(e) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per

case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(f) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other Territorial taxes paid.

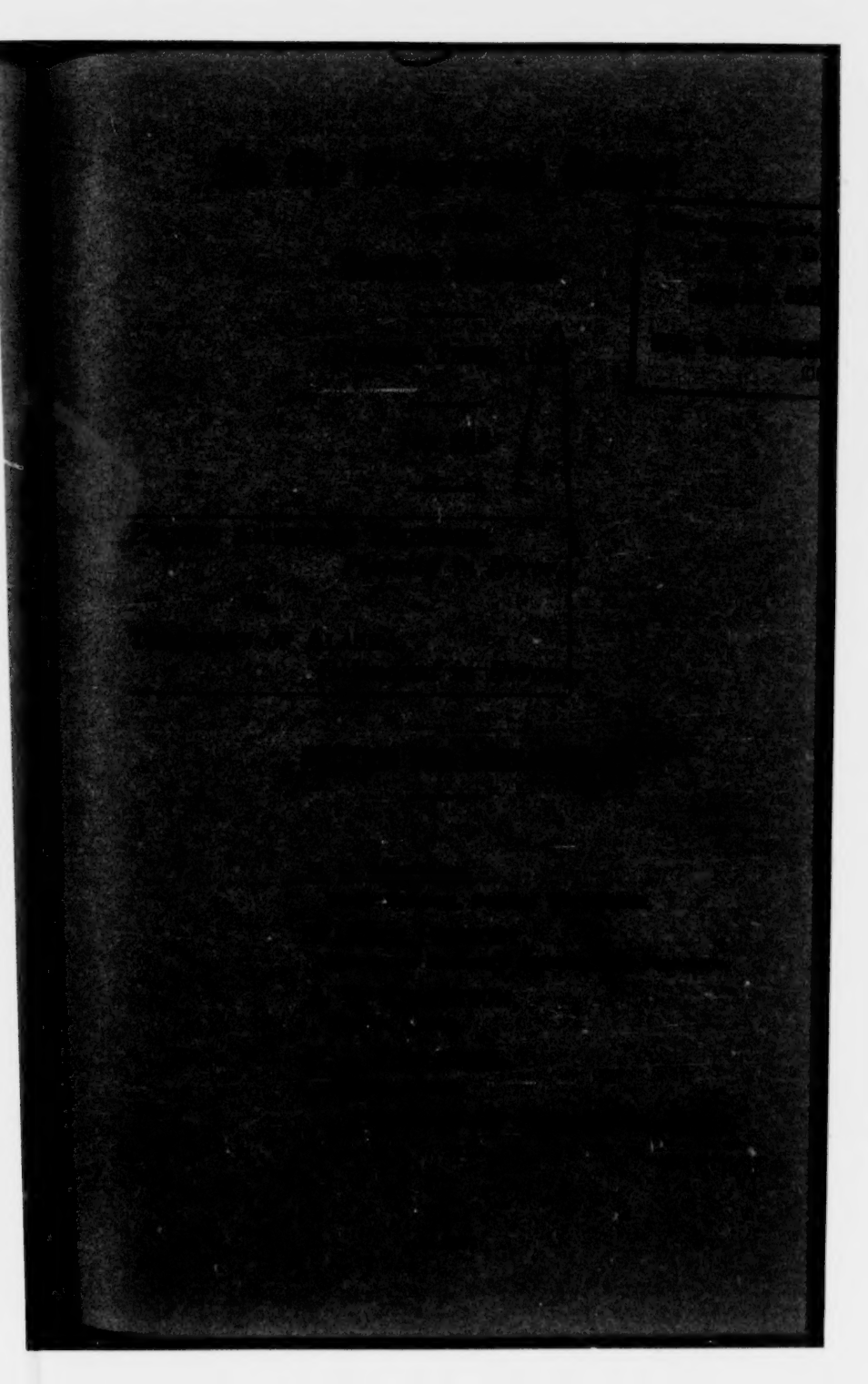
"(g) Salteries: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(h) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(i) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(j) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(k) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term 'fishermen' shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924."



DR SPRING SYN
MAINBETO

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 246

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING

INTRODUCTION

We ask for a rehearing in this case because we believe that the court has erroneously interpreted the statutes applicable. The decision [1] as it now stands creates a conflict of jurisdiction between the federal and territorial governments with respect to the regulation of fisheries, and imposes upon a packer the burden of determining which of these two conflict-

1. Printed in the Appendix.

ing jurisdictions shall control his operations. The uncertainty and confusion sure to follow this holding also impels us to present this petition.

The opinion is based largely upon the proposition that the Territory of Alaska possesses the power to regulate fisheries, not merely indirectly through taxation, but directly and openly by means of game and fish laws.

The Act of Congress of June 26, 1906, (set out in the appendix to our reply brief) as amended by the Act of June 6, 1924, C. 274, (43 Stats. 464) provides a complete system of regulation for the fisheries of Alaska. This is in part accomplished by laying down certain statutory rules governing the place, time and manner of conducting fishing operations. But to a much larger extent the duty of prescribing rules and regulations is delegated to the Secretary of Commerce.

This authority of the Secretary of Commerce has been extensively exercised. The present regulations are embodied in a Department of Commerce Bulletin, dated December 5, 1925, which, in the form we have it, fills some eighteen singlespaced typewritten pages. The Secretary has divided the Territory into twelve fisheries areas. Each of these is subdivided into several districts, and regulations as to the time, place and

manner of fishing; the gear to be employed; the close seasons; the escapement of fish to be permitted, etc., are provided in great detail. In many instances different rules are prescribed for specifically named small streams, islands and indentations of the shore line. In other words, the Secretary of Commerce, pursuant to the Act mentioned, has covered exhaustively and minutely the whole ground of regulation of Alaskan fisheries.

And yet, according to the decision rendered in the instant case, "the only purpose of the restrictions (on altering the fish laws applicable to Alaska) was to prevent the Territory from doing away with all protection in a short sighted rush for fish." If this is so, the Territory may prescribe other different and entirely inconsistent rules, and all such rules will be valid. But the Territory derives its power from an Act of Congress. So does the Secretary of Commerce. Which set of enactments shall control? How can a packer comply with the law? Are the penalties of the Territorial Statutes applicable, or those fixed by the Act of June 6, 1924? Does the regulation which is latest in time control, or vice versa? The inevitable result of applying such a doctriine is confusion and conflict of jurisdiction.

This is not idle speculation and groundless foreboding. The Legislature of Alaska by its Act of

May 4, 1923, (Session Laws of Alaska, 1923, C. 95) assumed to create a close season for salmon in substantially all of that portion of Alaska lying east of the extended boundary between Alaska and Yukon Territory. That is to say, south and east of the 139th Meridian. This area was divided by the Act mentioned into two parts, whose close seasons were as follows:

I.) Between the 57th and 60th degrees of north lattitude, from August 10th to September 1st, and

(II.) South of the 57th parallel, between August 20th and September 9th.

The same waters are covered by the regulations of the Secretary of Commerce above referred to. These latter subdivide substantially the same area into six districts. For each a different close season is established as follows:

(a) (Yakutat District, falling within area I. above), July 20th to August 5th.

(b) (Icy Straits—Cross Sound District, falling within area I. above). No fishing after August 6th.

(c) (Central District, falling within area I. above). No fishing after August 11th.

(d) (Stikine River District, falling within area II. above). June 10th to June 30th.

(e) (Prince of Wales Island District, falling within area II. above). August 22nd to September 14th, and for the remainder of the year after October 15th.

(f) (Southern District, falling within area II. above). August 18th to September 14th, and for the remainder of the year after October 15th.

It is no exaggereation, we think, to assert that no human being can say when fishing is lawful in Southeastern Alaska, and when it is not.

Yet this discord arises from one single regulatory act of the Territorial Legislature. With the doors thrown open to Territorial regulations, as they have been by the decision herein, the situation is sure to become intolerable. (2)

Furthermore the adoption of this rule came as a complete surprise to us and to everyone familiar with the Alaskan situation. The point seemed so well settled that we considered the argument of the Attorney General merely perfunctory. We answered it only brifly. It is announced summarily and without citation of authority by the court. No mention is made of the case of *Auk Bay Salmon Canning Company v.*

2. This act was a mere "feeler" on the part of the Legislature of Alaska as is shown by House Concurrent Resolution No. 15 (Sess. L. Ao. 1923, p. 309), which directed the Attorney General "to bring one action, only, and to carry and prosecute the same through the courts, for the purpose of determining the validity of said act (C. 95); and reporting the outcome of the same to the 1925 Session of the Territorial Legislature."

U. S., 300 Fed. 907, in which the Circuit Court of Appeals for the 9th Circuit considered the matter at length and adopted the contrary doctrine. All in all we feel that we have not had our day in court, and that in all fairness we should be granted an opportunity to present this question fully. The case is important. It involves some ten thousand dollars in itself, and, conservatively, a quarter of a million dollars in other taxes, payment of which has been withheld pending this action. And, if the present opinion stands, it involves endless expense and loss until the uncertainties above pointed out have been resolved by future litigation.

These then are our reasons for submitting the present petition. We realize that this is not the place for an extended argument nor an elaborate brief. We would, however, like to indicate in a summary way and as briefly as possible some of the authorities and reasoning which we believe invalidates the court's opinion. What follows is an attempt to do so.

ARGUMENT

I.

Effect of the Act of June 30, 1886

One of the principal arguments advanced in the opinion in support of the rule referred to, is to the

effect that the Act of June 30, 1886, (24 Stats. 170), made applicable to Alaska by reference by Section 9 of the Alaska Organic Act (August 24, 1912, 37 Stats. 512), recognized the power of the Territorial Legislature to pass laws for the protection of game or fish.

So far as we know, this Act was never referred to by the Attorney General, and in any event the reasoning seems clearly unsound. The Act of 1886 procided merely that the legislatures of the territories should not "pass local or special laws" with respect to a number of subjects, one of which was "the protection of game or fish." Section 9 of the Organic Act merely reenacted this, by saying that the Legislature of Alaska should not pass local or special laws "in any of the cases enumerated in the Act" of 1886. Even considering this much only of the Organic Act, it is obvious that no grant of power was intended. The Act of 1886 was purely a limitation on powers granted elsewhere by other statutes. But when we find that the Organic Act contains a direct, unequivocal and specific withdrawal of all power to "alter, amend, modify or repeal" the laws relating to game or fish, the argument loses all semblance of plausibility. Surely a later special enactment, referring to a definite and limited subject matter, cannot be controlled, and in effect nullified, by a prior general act without do-

ing violence to all of the canons of statutory construction.

II.

Effect of Inaction by Congress

The court seems to attach some weight to the fact that this act, passed as it was in 1923, has not been nullified by Congress. In *Clayton v. Utah*, 132 U. S. 632, and numerous other cases from this court, it is made clear that the courts attach no importance to failure on the part of Congress to act, unless the inaction has been so long continued as to have permitted a rule of property to be established. In no event does this doctrine of tacit approval permit legislation in conflict with the acts of Congress. *Clayton v. Utah*, supra.

We have here an act which even now has been in force less than three years. It involves a public function and not a rule of property. The circumstance that Congress, in that short period, has done nothing about it seems to us to be literally evidence of nothing whatever.

Nor does the fact, adverted to in the opinion, that this case was decided in the District Court (Record p. 33) 44 days before Congress passed the Amendment of June 6, 1924, revising the fish laws, lend any

support to the argument. The District Court allowed a writ of error on the same date that the judgment was signed (Record p. 38). The case was pending before the Circuit Court of Appeals on June 6, 1924. No one then knew or could know what the ultimate result would be. Section 8 of that act merely provided that nothing contained in it should detract from the powers of the Territorial Legislature to impose taxes or otherwise. It was purely precautionary; neither a grant of power nor a sanction of the manner in which the Territorial Legislature had previously exercised its authority.

III.

Regulation of Canneries as Distinct From That of Fisheries

Another point made by the court in support of its rule is that this act only purports to affect canneries and cannot, therefore, amount to a regulation of fishing. Subsection 8 of Section 2 of the Act attacked contains the provisions here involved. This subsection is headed "Fisheries"—not "Fisheries and Canneries." In other words the Legislature has treated a cannery as embraced within the description of "Fisheries."

Nor does the law purport to impose a tax on canneries. The tax is "*on a pack of kings, reds and*

sockeyes counted together at any one cannery." Would the court uphold a state tax of ten cents per ton on all freight in excess of one thousand tons handled through any one railway station, as applied to interstate commerce, on a ground that it was a regulation of stations? It is the pack of fish and consequently fisheries upon which the burden is imposed, not the cannery.

But even taking the court's view, it is nevertheless true—and a matter of common knowledge—that all but a negligible fraction of the salmon caught in Alaska are caught to be canned. They actually are canned. They must be canned within a period of not more than 48 hours after being taken from the water (Act of June 26, 1906, Section 7, supra), and they can only be canned at a cannery. Does it not necessarily follow that a restriction placed upon a cannery is a burden upon fishing? Would not an act prohibiting the canning of more than one thousand cases of salmon at any one cannery be a regulation of fisheries? The difference between such an act and this one is merely verbal and formal.

Finally, both the Circuit Court of Appeals for the 9th Circuit in this case in the court below, 2 Fed. (2d), 9, and the Supreme Court of Oregon in the case of *State v. Hume*, 95 Pac. 208, have directly passed

upon this question. They both decided that canning and fishing constitute one business, as we have contended. Neither of these cases is referred to in the opinion.

IV.

Bailey v. Drexel Furniture Co., 259 *U. S.* 20.

Our two most serious and elaborate arguments, namely, those based upon the above case (the second Child Labor case) and that grounded upon the Fifth Amendment, were summarily brushed aside by the court.

With respect to the first no reasons whatever are advanced. Our contention is in fact not even mentioned. In the case cited this court said, "Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, *but not so when one sovereign can impose a tax only, and the power of regulation rests in another.*" We thought, we argued strenuously, and we still think that this is directly applicable, word for word, to the present case. We may be wrong, but the court has not seen fit to tell us why. The argument is fully set out in the briefs and need not be repeated. We can only say most respectfully, but most earnestly, that we think

a consideration of real weight has not been dealt with as the importance of the case would seem to justify. Perhaps we did not sufficiently stress it. But whatever the cause may have been, we would greatly like to have an opportunity of presenting it again.

V.

The Fifth Amendment

The ground of invalidity urged under this heading has been passed over by the court substantially unnoticed. None of the numerous cases, such as *Cutting v. Kansas City*, 183 U. S. 79, which we relied upon, has been referred to in any way. The court merely says that "classification of taxes by the amount of corpus taxed has been sustained in various connections heretofore."

We deny that any classification such as that here adopted has heretofore been upheld. No such case was cited by the Attorney General; none is cited by the court, and we have found none. On the contrary, we have shown by repeated reference to occupational taxes (Brief pp. 27-41) that they have uniformly been held void where a classification has been made on the basis of amount of corpus alone. To be sure, one owning two articles may properly be taxed twice as much as the owner of but one. This is not classi-

fication; both are in the same class. But when the owner of two is taxed twice as much for the second as he is for the first, we submit that an unlawful discrimination is made. And we further submit that all of the cases so hold. At least none to the contrary has been suggested.

VI.

The Right of the Territory to Regulate Fisheries

In the introduction to this petition we referred to the consequences of the court's holding that the Territory has this right. In discussing some of the specific portions of the opinion we have mentioned some of the reasons militating against this conclusion. The argument was presented only in condensed form in our reply brief. This, of course, is not the place to set it out elaborately. However, we would like to outline as briefly as possible the reasoning which we think leads to the conclusion (adopted by the Circuit Court of Appeals in the Auk case, supra) that the Territory is wholly without power to regulate fisheries.

(a) All Such Power Has Been Specifically Withheld by Congress

Section 3 of the Organic Act provided:

"That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur-seal laws * * *."

In other words, Congress wholly withdrew from Territorial jurisdiction certain classes of general laws, such as those relating to customs, and the fish laws. Whether or not the Territory would have had any power to change the customs laws, for example, in the absence of such an enactment is beside the question. The point is that Congress evidenced the same intention with respect to such general laws and with respect to the fish laws.

(b) Congress Has Fully and Exclusively Occupied the Whole Field

At the time the Organic Act was enacted the Act of June 26, 1906, (34 Stats. 478), recently amended by the Act of June 6, 1924, supra, was in force. This Act contained detailed provisions for the regulation of fisheries. It dealt specifically with the question of close seasons. The Amendatory Act referred to, as

we have heretofore mentioned, goes into considerably greater detail, and by delegation of authority to the Secretary of Commerce effectively and fully covers the whole field.

The following authorities go much further on this point than it is necessary to go in the instant cases:

Adams Express Co. v. Croninger, 226 U. S. 491;

Missouri, Kansas & Texas R. R. v. Harriman, 227 U. S. 657;

Atchison & Topeka Ry. v. Harold, 241 U. S. 371 (378);

St. Louis Iron Mountain & Southern Ry. v. Edwards, 227 U. S. 265.

These were all cases where the states had established regulations that were merely additional to, and not in terms inconsistent with, congressional legislation.

The following cases specifically decide that the states have no power to add to or supplement the federal laws in a field in which Congress has paramount authority:

Prigg v. Pennsylvania, 16 Pet. 536 (617);

Erie R. R. Co. v. New York, 233 U. S. 671 (680, 683);

Charleston & Carolina R. R. Co. v. Varneville Co., 237 U. S. 597 (604);

Southern Ry. Co. v. R. R. Commission, 236 U. S. 439 (446).

The substance of the foregoing authorities is that where Congress has entered a field, then any regulation whatsoever whether it be identical, additional or less than the Congressional regulation, is void and of no effect.

Furthermore, the rule is the same where Congress, as in the Act of June 26, 1906, supra, and the Amendatory Act of June 6, 1924, has empowered an executive or administrative body to promulgate regulations.

Actiesselskavet Ingrid v. Central R. R. Co., 216 Fed. 72 (82).

(c) MEANING OF "ALTER, AMEND, MODIFY OR REPEAL"

The words "alter, amend, modify or repeal" clearly include the meaning "add to".

2 C. J. 1165;
2 C. J. 1316;
Soule v. Soule, (Calif.) 87 Pac. 205.

(d) THE POINT HAS NEVER BEEN DECIDED EXCEPT AS WE CONTEND

Nor does the case of *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U. S. 44, referred to in the opinion, in any manner sustain the right of the

Territory to regulate fisheries. It is true that that case contains certain language to the effect that, in enacting a taxing measure, a consideration of collateral advantages is not improper. This language was addressed to the contention that the act in question violated the due process clause of the Fifth Amendment. The case held simply and solely that the act was what it purported to be, namely, a taxing measure, and was neither a violation of the due process clause nor an attempted regulation of fisheries.

That act contained no such features as are present in the one here involved. As we have stated, the portion of that case referred to in the court's opinion here, related only to the due process clause. When the court came to consider the contention that the act violated the Organic Act, for the reason that it constituted an increase of the tax prescribed by the Act of June 26, 1906, the court simply said that the tax imposed by the Act of 1906 was not a fish law. It did not say, and never has said that a fish law may be enacted under the guise of a taxing measure.

CONCLUSION

We have presented as concisely as the subject matter will allow our reasons for asking for a rehearing. We feel, with all due respect, that the court has not

appreciated and has not decided the fundamental questions involved in this case. We feel too that the court has decided, greatly to our disadvantage, a question which was not properly in the case and which we argued only incidentally.

We, therefore, most earnestly request that the court set this case down for further argument.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

The undersigned, E. S. McCord, one of the attorneys for the plaintiff in error, hereby certifies that in his opinion the foregoing petition is well founded in law, and that the same is not interposed for delay.

E. S. McCord.

Appendix

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 246

PACIFIC AMERICAN FISHERIES, Petitioner,

vs.

TERRITORY OF ALASKA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the Territory of Alaska to recover from the petitioner, Pacific American Fisheries, license taxes alleged to be due upon cases of salmon packed by the defendant at four canneries named. The defendant in its answer set up that the territorial taxing act was contrary to the Act of Congress of August 24, 1912, c. 387, (§ 3), 37 Stat. 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. The Territory demurred; there was a judgment for the plaintiff and this was affirmed by the Circuit Court of Appeals. 2 Fed. Rep. (2d) 9. A writ of certiorari was granted by this Court. 267 U. S. 589.

The taxes in question were imposed by c. 101 S. § 2, subdivision 8th, Laws of Alaska, 1923, amending c. 31 of the Laws of 1921. By (c) of that subdivision salmon canneries, after a tax by (b) of ten cents per case, are charged an additional tax on a pack of kings, reds and sockeyes, counted together, at any one cannery, as follows: On all cases in excess of ten thousand and not more than twenty-five thousand, five cents per case; in excess of twenty-five thousand and not more than forty thousand, ten cents per case; in excess of forty thousand and not more than fifty thousand, fifteen cents per case; and on all in excess of fifty thousand, twenty cents per case. Similarly in (d) and (e) a tax of four and one-half cents per case is imposed on medium reds, cohoes, and pinks; with additional taxes for each increase of numbers as in the previous subdivision. By (f) chums are taxed three cents per case. The petitioner says that this graduated tax is inconsistent with the Act of Congress mentioned, which provides that the authority therein granted to alter, amend, modify and repeal laws in force in Alaska should not extend to the game, fish and fur seal laws, and presses this contention notwithstanding the further proviso that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. The petitioner also says that the classification upon which

the surtax is based is unreasonable and a denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States. No question is raised about the uniform tax of ten cents per case imposed by (b). That has been paid.

The petitioner offers various reasons to show that this tax is not what it purports to be but is an attempt to regulate fisheries, which, the petitioner believes, Congress has not given the Territory power to regulate. The answer alleges that it was known that the revenue from these taxes would exceed the appropriations and needs of the Territory, and from this and other things the conclusion is drawn that the taxes were levied with the intent of driving the defendant out of its business. But the premise could not be known, it only could be prophesied. If known the conclusion as to legislative intent would not follow; and if the intent were entertained, in the only sense in which it rationally could be imputed, that is, to discourage canning the larger amounts, the legislature lawfully might act with that intent. Fisheries were not the direct object of attack, but canneries. It would require a strong case in any event to invalidate a tax on things that the legislature had power to regulate because of its collateral reaction on something else. But here even as to fisheries the legislature is given power to tax. (Any tax is a discour-

agement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a shortsighted rush for fish.) At least we must take it to be clear that the unlimited power expressly given may be exercised with consideration of collateral advantages and disadvantages. *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U. S. 44, 48. It could not be exercised intelligently otherwise. The extent of the power is a question of specific interpretation not of general principle; and therefore we leave the many familiar cases that were cited, on one side.

It is not unworthy of notice that in § 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, c. 818, § 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of game and fish is recognized, and also that the latest revision of the fish law by Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction

with the way in which those powers had been used. Act of June 6, 1924, c. 272, § 8; 43 Stat. 464, 467.

It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially as contravening the Fifth Amendment and denying due process of law. Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its full capacity; that there always will be an irreducible minimum of expense to be borne whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law justly may attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights. Judgment affirmed.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No.

PACIFIC AMERICAN FISHERIES,
Petitioner.

vs.

TERRITORY OF ALASKA,
Respondent.

Brief for Respondent
On Petition for Certiorari.

STATEMENT OF CASE

Three questions present themselves in this case, viz:

1. Does the inhibition upon the local legislature to "amend, modify or repeal" the laws of Congress regulating the manner of catching fish in the waters of Alaska deprive the legislature of all police power over the industries dependent upon fishing, such as the manufacture of fish products?

2. If the legislature possess no police power over the manufacture of fish products, may it, nevertheless, under its general power to levy excise taxes, levy upon the canning of salmon an excise which has a tendency to regulate the industry?

3. In levying an excise may the legislature grade the rate of the tax so as to be proportionately heavier upon the larger outputs, if thereby the burden of the tax becomes more equalized in proportion to the ability to carry it?

ARGUMENT

I

The first question was decided by this court in Alaska Fish Salting and By-products Co. vs. Smith, 255 U. S. 44. That case involved an excise levied upon oil and fertilizers manufactured from herring, while no such tax was levied upon oil or fertilizer manufactured from offal of fish. The tax was admittedly regulatory in its purpose. Plaintiff complained it was destructive of the industry. This court held that the Territory had a right to use its taxing power to put a stop to the manufacture of manure from food fish, notwithstanding the lack of power to enact "fish laws." "This," said the court, "is not a fish law, as we understand it", it is a tax.

The only laws at the present time looking toward the sanitary conditions of the great canning industry of Alaska are those enacted by the local legisla-

ture on the theory that it had police authority over the industry ashore, and consisting not of fishing, but of making food out of fish.

If the Territory has no regulatory authority over these industries, all sanitary regulations become null and void.

Again, in the case of Haavik vs. Alaska Packers Assn., 263 U. S. 510, this court held that the legislature had power to levy an excise tax of five dollars on all non-resident fishermen, though no such tax was levied upon resident fishermen. The fact that the tax was discriminatory did not invalidate it, because the only uniformity required by the constitution is geographical uniformity.

II

The Court of Appeals held, in this case, that the inhibition against regulating the manner of catching the fish was in itself an inhibition against the regulation of the manufacture of the products from fish. Following out that theory, the court stated, in substance, that it could not be presumed that an unlimited power to tax was granted where there was no power to regulate.

This expression seems rather inadvertent than deliberate.

Congress has no police authority over industries and yet may, by the excise, tax industries to death. This it has done several times; and may also by the

same taxing power and discrimination, bring industries into being. This, too, it has often done.

While the police, or regulatory, power has been retained by the states, the Congress may nevertheless, by the excise, destroy the industries in the various states.

Veazie Bank vs. Fenno, 8 Wall. 533.

Where the legislature has the taxing power, and employs it, the court will not inquire whether it has been employed wisely, or justly,—or even honestly. The only question, in such case, asked by the court is whether or not the legislature had jurisdiction.

That the law here in question is a tax will not be doubted. If it is, the legislature had jurisdiction, and there the inquiry of the court stops.

On this point the case of McCray vs. United States, 195 U. S. 27, is typical. This court there considered a law which imposed a tax forty times as high on yellow as on white oleomargarine. Obviously the tax was designed to drive oleomargarine out of the market as a competitor with butter. This court held the purpose of the law was beyond its function to consider. The law was enacted in pursuance of the taxing power, and whether that power has been used to destroy the industry, even though the legislature had no police power, was a question beyond the jurisdiction of the court to consider.

In the Veazie Bank case this court sustained a law

obviously designed to, and which did, drive notes of State Banks out of circulation. Congress had no regulatory power, but it had unlimited taxing power.

When Congress gave the local legislature power to tax business it thereby gave the power to destroy business, and the court will not inquire whether the power was abused or not.

That the Territory has the taxing power is not doubted.

Alaska Pac. Fisheries vs. Territory, 236 Fed. 52;
Alaska Salmon Co. vs. Territory, 236 Fed. 62;
Northern Com. Co. vs. Territory, 289 Fed. 786;
Alaska Fish Co. vs. Smith, 255 U. S. 44;
Haavik vs. Alaska Packers Assn.,263 U.S. 510;

The objection is made that classification of subjects for the purpose of taxation cannot lawfully be based upon amount of business transacted. But "classification by amounts" has been uniformly approved of by this court.

The income tax and inheritance tax laws both classify the subjects by amounts and are graduated upwards. The larger the income and the inheritance, the proportionately larger the tax.

In Clark vs. Titusville this court considered an ordinance which graduated the license tax upon commercial business so that proportionately the heavier tax was paid by the smaller establishments.

This court held it good, and said that exactly the same rule of law applied to a graduated tax upon any industry as applied to income or inheritance. "Classification by amount", said the court, could lawfully be applied to anything the same as to inheritance. The classification by amount means different rates upon the different classes established on basis of difference in the amount. That case should settle this question.

Whether the tax is graded upwards or downwards depends upon the location of the starting point. If this law fixed the tax at 30c per case on the pack over 40,000 cases, 25c per case on the pack between 30,000 and 40,000 cases, 20c per case on the pack between 20,000 cases and 30,000 cases, etc., it would be grading downward. The mere fact that it started at the other end of the ladder does not affect the right to use the ladder.

III

The reasonableness or unreasonableness of a discrimination is not a question for the court, but in view of what has been stated by the court below relative to my admissions as to the discriminatory character to the tax, I quote the following from pages 9 and 10 of my brief before the Court of Appeals:

> "The theory on which the court is asked to hold, as a matter of law, that a tax graded "upwards" is void though one graded downward is valid, is set out on pages 37 and 38 of counsel's brief and is worth quoting:

"'The court will know judicially that in the business of managing a salmon cannery in Alaska there is an irreducible minimum of expense which must be borne, regardless of the size of the pack. * * * * The larger the pack at any cannery the proportionately less charge for this overhead enters into the cost of the canned product. * * * * Through such taxation the large factory may be compelled to pay proportionately more for its output than the small factory, and the employer of a large number of men may be compelled to pay more per employee than the small employer, and all the economy which has resulted from the concentration in a single plant of large and efficient equipment and machinery would be swept away.'

"This is all true. But is not the wisdom of such legislation a matter for the lawmakers rather than for the court to decide?

"Undoubtedly, an ungraduated tax would fall proportionately heavier on the small than on the big operator."

It is notorious that the run of fish varies each year on the various parts of the coast. Some canners may secure salmon enough for all they are equipped to handle, some may secure only "half pack," and some only a third, or less, of what they prepared for. One who gets "full pack" makes heavy profits; one who secures a small pack will probably lose money. To require the same case tax from all would place an unequal burden on the operators. The graduation of the tax is in a measure to equalize the burden. The apparent discrimination against the large pack

is therefore justified as the more equitable,—if that question is to be considered by the court as within the province of the judiciary.

The limitations upon the power of the states embodied in the fourteenth amendment to the constitution do not apply to the Territory of Alaska.

Alaska vs. Troy, 258, U. S. 101;

Haavik vs. Alaska Packers Assn.,263 U.S.510.

Respectfully submitted,

JOHN RUSTGARD,

Attorney General of Alaska,

Attorney for Respondent.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 844 246

PACIFIC AMERICAN FISHERIES, PETITIONER,

vs.

TERRITORY OF ALASKA, RESPONDENT.

BRIEF FOR RESPONDENT.

JOHN RUSTGARD,
Attorney General of Alaska,
Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 844

PACIFIC AMERICAN FISHERIES, PETITIONER,

vs.

TERRITORY OF ALASKA, RESPONDENT.

BRIEF FOR RESPONDENT.

Statement of Case.

As near as can be determined from petitioner's brief, the major premises underlying petitioner's several contentions may be briefly stated as follows:

1. That the Territory of Alaska has no police power over the fisheries, nor other authority to regulate the same.

2. That inhibition against regulating fishing necessarily carries with it by implication an inhibition against regulating the manufacture of fish products.

3. That the power to levy an excise tax, unaccompanied by a police power, cannot be so laid as to regulate an industry.

4. That, for the purpose of taxation, "classification by amount" is unconstitutional in event the tax is "graded upwards."

5. That the revenue resulting from the tax in dispute is grossly in excess of the total appropriations of the Legislature and therefore presumably in excess of the needs of the Territory.

6. That at the time the act in question was made into law it was "openly claimed by the Legislature that the purpose of the passage of said chapter of the Laws of Alaska for 1923 was to regulate the fishing and the catching of salmon."

7. That the term "cannery" as employed in the act is too vague and indefinite.

To these contentions the respondent answers:

1. That the territorial Legislature does have the right to regulate fishing so long as its enactments do not conflict with, *i. e.*, interfere with, the laws of Congress on that subject.

2. That the regulation of canning or of other industry dependent upon fishing is not in conflict with any "fish laws" of Congress.

3. That, for the purpose of taxation, industries may be classified upon the basis of the amount of "net income," "gross income," or "amount of out-

put," and a graduated or progresive tax may be levied upon each class, although there be no police authority associated with the taxing power.

4. That though there be no police power or regulatory authority over an industry, an excise tax is not void because it is so levied as to regulate the industry.

5. That if a law be enacted by virtue of a taxing power the courts will not inquire whether it was intelligently, or even honestly, enacted.

6. That an excise tax so levied as to rest proportionately heavier on a large output than on a small output is a reasonable attempt at apportioning the tax in proportion to the ability of the various establishments engaged in a business rendered hazardous by the irregularity and uncertainty of the run of fish each season in the various localities of the Alaska coast.

7. That the Court will not look behind the statute to inquire into the motives of the Legislature.

8. The Territory has no authority to incur indebtedness and the Legislature must therefore take care to provide sufficient funds to meet all appropriations, and the income from licensee being uncertain, ample provision must be made to avoid a deficit.

9. The meaning of the term "cannery" is not involved because in each count the plaintiff alleges defendant operated "a cannery" at a place named, and defendant answers that it did operate "a cannery" as alleged.

ARGUMENT.

I.

Territory Has Police Power Over Fisheries.

The tax in question is assailed on the theory that the law in question is not a revenue measure but purely a regulatory measure, and that the Legislature has no police power over the canning industry.

It is conceded that if the local Legislature has any regulatory authority over the industry of canning salmon the petitioner has no cause for complaint.

An examination of the acts conferring power upon the local Legislature becomes, therefore, necessary:

The Legislature of the Territory of Alaska was created by Act of August 24, 1912 (37 Stat. at L. 512 (ch. 387)).

In legislating for a territory Congress acts in a dual capacity: It exercises the Federal functions bestowed upon it by the sovereign States, and it also exercises the plenary powers of a local territorial legislature.

Binns *vs.* United States, 194 U. S. 486.

The latter authority may be delegated, and by the act above mentioned, and known as the Organic Act, was delegated to the Legislature of Alaska, with certain express reservations.

The legislative authority is conferred by Section 9 (Appendix B) of the Organic Act. This section provides that "the legislative powers of the Territory shall extend to all rightful subjects of legislation." Had the act stopped at

that point the sentence quoted would have delegated to the Legislature all the authority which Congress itself possessed over the Territory exclusive of the Federal functions.

But several limitations are entailed upon the power delegated. One of those limitations is contained in the clause from Section 3 (Appendix A) relied upon by petitioner. That clause reads as follows:

> "That the authority herein granted to the Legislature to alter, amend, modify or repeal laws in force in Alaska shall not extend to the * * * game, fish and fur-seal laws * * * of the United States applicable to Alaska."

It is now contended that this inhibition against altering, amending, modifying or repealing certain statutes then in existence regulating the fisheries not only withholds from the Legislature all police power over the catching of fish, but also deprives the Legislature of all police power over the shore industries dependent upon fishing.

In the case at bar the Circuit Court of Appeals made a statement which would seem to assume that the Legislature has no police authority over fisheries in Alaska, and counsel assumes this to be justified by the case of Auk Bay Salmon Co. *vs.* United States, 300 Fed. 907.

In the first place, it should be noted that the Auk Bay case simply decided that a certain statute enacted by the Legislature establishing in certain districts a period of ten days during which fishing of salmon was prohibited was void. The Circuit Court of Appeals held this statute an attempt to modify the Congressional Act which established a closed season of thirty-six hours at the end of each week. Nothing else was decided.

In the second place, it is my firm belief the court, in rendering that decision, overlooked former decisions by this Court, because it is well settled that where the territorial law and the Congressional law do not interfere with each other, and where both are operative and enforcible simultaneously, they cannot be held to conflict.

In the third place, regulation of shore industries cannot be said to be modification of the rules prescribing the methods for catching the fish.

The present chapter will deal with the police power over fisheries. The next will deal with the police power over the shore industries dependent on fishing.

The Fish Laws.

What are these "fish laws" referred to in the Organic Act which the Legislature is prohibited from repealing or modifying?

They consist of two Acts, one of June 14, 1906 (35 Stat. 263 (Ch. 3299)), and the other the Act of June 26, 1906 (34 Stat. 478 (Ch. 3547)).

Neither of these Acts confers any rights to fish. They merely place certain restrictions upon the time and manner of catching fish.

The common right of fishery is a right conferred by the common law and guaranteed by Magna Charta. It is coexistent with the common right of navigation.

Upon this common right of fishery the Congressional fish laws above referred to place certain restrictions aimed to conserve the fish supply.

What is a "modification" of those laws? Are additional restrictions upon the right to fish to be considered "modifications" of prior restrictions?

The test applied by this court, as will be presently demonstrated, is this: Can both laws operate simultaneously without interference one with the other?

The fish laws in question, being in their nature purely restrictive, can be "modified, altered or amended," or otherwise interfered with, only by relaxing them, or hampering their enforcement. No attempt has been made to do so. Additional restrictions cannot be said to relax, or conflict with, prior restrictions.

This view was expressed very explicitly by this court in Alaska Fish Salting and By-Products Co. *vs.* Smith, 255 U. S. 44. In that case the territorial Legislature was accused of having levied an excise tax for the purpose of putting a stop to fishing herring for use as fertilizers. Plaintiff took the very reasonable position that the levy of such a tax was an attempt to regulate fishing. This court unhesitatingly answered that the Legislature had such authority under the present Organic Act.

The court said:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years, * * *. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the Legislature has the full power of taxation."

This is a clear pronouncement that the Legislature of Alaska has authority to use its taxing power not only to

limit fishing but to absolutely stop fishing. Why, then, may not the same power be employed in the same manner to limit or regulate canning?

In a still more recent case (Haavik *vs.* Alaska Packers Association, 263 U. S., 510), this court held that in the exercise of its taxing power the Legislature had authority to discriminate against non-resident fishermen and in favor of resident fishermen, a tax of five dollars having been levied upon the former and none upon the latter. The tax was confessedly regulatory in its nature and purpose. But it was held good. The court said:

> "Plainly, we think, the territorial Legislature had the authority * * * unless, for want of power, Congress itself could not have laid them (the taxes) by direct action."

Referring particularly to the discriminatory character of the tax the court says:

> "The tax applies only to non-resident fishermen; citizens of every State are treated alike. Only residents of the Territory are preferred. This is not wholly arbitrary or unreasonable and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend."

In support of this doctrine the Alaska Fish Salting and By-Products case is cited as authority by the court.

In the Haavik case the right of the Legislature to regulate fishing is the fundamental doctrine and clearly implied, if not expressed.

Conservation of the fisheries was the sole purpose of Congress in withholding from the Legislature the right to repeal or modify the fishing restrictions in force at the time the Organic Act was passed. It was feared that the people of the Territory might not be able to withstand the onslaught of those who were thought to have a predatory disposition towards the fishing grounds. That the local Legislature would be too strict in its conservation policies was certainly never considered possible. In the light of these facts the language of the Organic Act must be construed. Is it not fair, then, to assert, that the Federal fish laws merely represent the most liberal terms on which Congress would permit fishing in Alaska waters, and that the local Legislature was at liberty to enact as many more restrictions as it found necessary for the perpetuation of the Territory's main industry?

There is certainly nothing in the Organic Act to lend support to the contention that Congress meant to prohibit the Legislature from protecting the fishing grounds against depletion in event the Congressional enactments were found inadequate.

If the language employed be insufficient to dispel all doubt on this subject, the debate on the floor of the House, when the clause in Section 3 of the Organic Act was under discussion, is surely ample for that purpose:

The bill, which is now the Organic Act, came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso in Section 3 was as follows:

> "That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States."

And nothing was there said about the game or the fish. Whereupon the following occurred:

"Mr. Willis: Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The clerk read as follows:

Line 9, page 23, after the word 'States,' insert the words 'or to the game laws of the United States applicable to Alaska.'

Mr. Mann: Why not make it game and fish laws?

Mr. Wickersham: Mr. Chairman, I think the fish laws ought to be left alone.

Mr. Mann: Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. Willis: Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified, and reported as modified.

The Chairman: Without objection, the amendment will be so modified, and the clerk will report the amendment as modified.

The clerk read as follows:

Line 9, page 23, after the words 'State,' insert the words 'or to the game and fish laws of the United States applicable to Alaska.'

Mr. Wickersham: Mr. Chairman, I do not think that the word 'fish' ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this Legislature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the Legislature from protecting the fisheries in that Territory, and it ought not to be in the bill.

Mr. Mann: The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. Willis: It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the Legislature of the Territory of Alaska shall not have the power to alter, amend, or repeal the United States fish or game laws now in force in the Territory. It does not take away from the Legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. Wickersham: I think they ought to be allowed to amend them.

Mr. Willis: We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. Wickersham: No.

Mr. Willis: That is all this amendment provides; that the Legislature shall not have the power to amend the present fish or game laws.

Mr. Wickersham: What does that mean?

Mr. Willis: It means that the present law shall stand.

Mr. Flood, of Virginia: Suppose Congress passes a law revising and extending the fish laws there?

Mr. Willis: Well, undoubtedly that will be the paramount law of Alaska.

Mr. Flood, of Virginia: What will be the effect of the gentleman's amendment?

Mr. Willis: The effect of this amendment will be, as I understand it, simply to take away from the Legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. Flood, of Virginia: It would not have the effect to take away from the Legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. Willis: No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. Mann: They would not have that power.

Mr. Willis: They would not have that power now.

Mr. Flood, of Virginia: The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. Willis: Yes; I think the bill is a good one and ought to pass.

Mr. Flood, of Virginia: And will in all probability become the law.

Mr. Willis: It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection; but I do not believe the Legislature ought to repeal the present game or fish laws.

Mr. Mann: We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed; but, if they want to make them more stringent, and probably do, they ought to have that right.

Mr. Flood, of Virginia: I do not think the amendment means anything; but, if it will please anybody to put it in, why, let it go.

Mr. Wickersham: I shall withdraw my objection.

The question was taken, and the amendment was agreed to."

(Vol. 48, part 6, page 5288, Congressional Record, 62d Congress, Second Session.)

This dual authority is no novelty in our system of government. It permeates nearly all of our institutions and has become recognized as salutary wherever practically available. I shall cite some illustrations:

The principle has been applied to the mining laws, where

this duality of authority is yet maintained. Said the Court of Appeals in Northmore *vs.* Simmons, 97 Fed. 386:

> "The statute was intended to express the most liberal terms on which the United States would part with its mining claims. No State Legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the requirements of the United States."

It was then held that additional requirements might be imposed by local legislatures.

To the same purport are the following:

Erlrardt *vs.* Boaro, 113 U. S. 527;

Mining Co. *vs.* Kerr, 130 U. S. 256;

Sissons *vs.* Sommers, 55 Pac. 829.

It has been held by this Court that though Congress, in pursuance of its constitutional authority, prescribe rules and regulations for the use and occupancy of public lands, the individual states have authority to enact police regulations covering the same field, and these police regulations are valid unless they contravene the regulations promulgated by Congress.

McKelvey *vs.* U. S., 260 U. S. 353 (358).

The same duality of authority of State and Federal Government is recognized in interstate commerce regulations; and the same rule of holding both state and Federal regulations valid obtains in that field.

Carey *vs.* South Dakota, 250 U. S. 118 (122);

Savage *vs.* James, 225 U. S. 501;

Reid *vs.* Colorado, 187 U. S. 148;
Missouri, K. & T. R. Co. *vs.* Haber, 169 U. S. 613;
Northern P. R. Co. *vs.* North Dakota, 250 U. S. 135 (150*b*).

The principle was applied to the Migratory Bird Act in the case of Carey *vs.* South Dakota, *supra,* where it was held that State laws enacted to protect migratory birds were not rendered void by the Congressional enactment which expressly provided that those birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for."

The logic of this Court upon which that decision was based is applicable to the case at bar. The Court said:

> "It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject; and that the failure to make any provision in the Federal act concerning shipping evidences the purpose of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds 'shall hereafter be deemed to be within the custody and protection of the Government of the United States.' But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being 'destroyed or taken contrary to regulations' which are to fix the closed seasons in the several zones."

The Court then added, that the intent to supersede the exercise by the State of its police powers is not to be implied

unless the act of Congress, fairly interpreted, is in *actual conflict* with the law of the State.

In support of this statement the Court cited Savage *vs.* James, 225 U. S. 501, and Missouri, K. & T. Co. *vs.* Haber, 169 U. S. 613. The former of these two cases involved the question of whether or not a State law enacting certain rules and regulations for inspection and labeling of "concentrated commercial feeding stuff" was void as to its application to original packages transported in interstate commerce, and whether it invaded the same field covered by the food and drug act.

The argument in that case, as in the case at bar, was that those acts which were not by Congress expressly prohibited must be construed as permitted, and that additional limitations is alteration or interference.

This Court answered:

> "Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.' We have already noted the limitations of the provisions referred to. It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

"Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, and that which needs must be applied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power.*

"*But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State.* This principle has had abundant illustration." (Italics mine.)

In the case of Missouri, K. T. R. Co. vs. Haber, *supra*, the question was as to whether an inspection law of a state was in conflict with a similar law on the same subject enacted by Congress. The test which this court applied should be applied in the case at bar. It was thus stated:

"*May not the statutory provisions* (of the State) *stand without embarrassing the execution of the Act of Congress?*" (Italics mine.)

It was held both acts could be enforced without interference with each other.

Exactly the same may be said about the fish laws of the Territory. Both those of Congress and those of the Legislature may be enforced at the same time. And that is the test.

The American doctrine is clearly stated by Mr. Chief Justice White in Northern P. R. Co. *vs.* North Dakota, 250 U. S. 135 (150*b*), as follows:

> "Although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that *to the extent that any conflict arises* the State power is limited, since *in case of conflict* that which is paramount necessarily controls that which is subordinate." (Italics mine.)

The debate in the House shows that the men who enacted he Organic Act of Alaska had this very rule clearly in mind. So, also, under the Eighteenth Amendment to the Constitution, the rule has been applied:

Vigliotti *vs.* Pennsylvania, 358 U. S. 403.
Kennedy *vs.* U. S., 265 U. S. 344.
Hixson *vs.* Oakes, 265 U. S. 254.

This principle was applied to the Alaska Prohibition Act y Circuit Court of Appeals.

Abbate *vs.* U. S., 270 Fed. 735.

Section 9 of the Organic Act also, by reference, incorrates the Act of July 30, 1886 (24 Stat., 170 (Ch. 818)), to the limitations imposed upon the legislative powers. hat act provides, *inter alia*, that the Legislature

"shall not pass local or special laws in any of the following cases, that is to say:

* * * * * * *

"The protection of game and fish."

Ordinarily no one would deny that this is a recognition of the authority to protect game and fish so long as the laws enacted for that purpose are general and not local in character.

The Organic Act may, therefore, be said to contain two limitations upon the power of the Legislature to enact fishing regulations, to-wit: such regulations must not be local in extent nor must they conflict with the regulations enacted by Congress.

That the salmon of Alaska was being depleted because of insufficient restrictions was notorious; that the Legislature had authority to impose additional restrictions was never seriously doubted, but the nature of the salmon fishing is of such a character that it is difficult if not impossible to enact general laws on the subject which are both just and effective.

Nevertheless, in 1923 the local Legislature enacted Chapter 95 of the Laws of 1923 (Appendix C) to supplement the Federal Laws. The principal and most difficult question presented was whether or not this Act was "local" in character. The Circuit Court of Appeals of Ninth Circuit, in Auk Bay Salmon Canning Co. *vs.* United States, 300 Fed. 907, held the Act void for the following reasons:

The Congressional law provided for a closed period of thirty-six hours at week-end throughout the season. The Territorial law provided for the establishment of an *additional* closed period of ten consecutive days in some districts

during the middle of the salmon run. The court held that this was an extension of the closed period established by Congress and as such an amendment of the Congressional law. The decision was carefully and expressly limited to that point.

Nevertheless, counsel in their arguments in the case at bar before the Circuit Court of Appeals assumed the decision to adjudicate definitely that the Legislature had no authority whatever to prescribe any fishing regulations. So skillfully was this done that the court below, evidently without examination, accepted counsel's premises as undisputed and assumed that it was settled that the Legislature had no police power whatever over fisheries.

For the reasons heretofore assigned respondent not only questions the correctness of the decision in the Auk Bay case, but also denies that that case can be construed to have the sweeping effect accredited to it by counsel.

Under this topic it remains to be observed that more than one year after this very tax law here in question had been enacted, more than three months after it had been upheld by the District Court, more than one year after Chapter 95 had been enacted, and more than six months after that act had been held valid by the District Court,—and while both those laws were presumably good, the Congress, on June 6th, 1924, enacted a new fish law for Alaska. (Ch. 272 Stat., First Session 68th Congress.) Section 8, pg. 467, of this law contains this significant provision:

> "Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or

> licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, 'To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.'"

This is at least a reasonably clear recognition by Congress that the Legislature had some regulatory authority over fisheries, that a dual authority over the subject did exist, and that this dual authority was designed to be continued in the future.

If Congress had regarded the statutes then actually in force in the Territory, whether tax laws or police regulations, as *ultra vires*, something in some form would have been said about it in the new fish law, instead of, in the most sweeping language, asserting that there was no intention to abridge the power of the Territory. Again it was obviously conservation that was aimed at.

The construction which Congress has thus placed upon its own enactments should count for something.

The new fish law for Alaska is not essentially different in principle from the Migratory Bird Law of Congress. Both place the authority to prescribe regulations in the Department of Commerce and neither denies to States or Territory power to add further restrictions.

II.

Regulation of Canning is Not Regulation of Fishing.

In the foregoing chapter I have endeavored to show that the only limitation upon territorial authority over fisheries consists of prohibiting the Legislature from relaxing the

regulations which have been enacted by Congress for the purpose of conserving the fish supply.

But, assuming that this view be incorrect, there is certainly nothing in the statutes to indicate that it was the intent of Congress to deny to the Territory full police authority over the shore industries whether the same be dependent upon the fish in the ocean, or the trees in the National forest, or the coal and oil in the public lands. To assume that the Legislature has not police authority over the manufacture of fish products unless it has full authority over the catching of the fish, would justify the assumption that the Legislature has no police authority over the sawmills or any other part of the lumber business where the timber used is cut on a Government reserve and where it has no authority over the trees before they were cut into logs, or the assumption that it has no authority over any industry dependent upon interstate commerce unless it also has jurisdiction over interstate commerce.

Analogous situations have frequently been passed upon by this Court. Thus:

Though Congress has no jurisdiction over corporate franchises granted by States and therefore may not tax such franchises, Congress may, nevertheless, levy a tax upon the transfer of shares of stock in a corporation existing under a State franchise.

Thomas *vs.* United States, 192 U. S. 363.

A tax upon bank notes is not a tax on the franchise of the bank.

Veazie Bank *vs.* Fenno, 8 Wall. 533.

An income tax upon a corporation, though not upon an individual engaged in the same business, is not a tax upon the franchise of the corporation.

Flint *vs.* Stone Tracy Co., 220 U. S. 108.

While the Federal Government may not regulate the descent of property or of conveyancing it may tax inheritance, legacies and other conveyancing,—and may do so by discriminatory classifications which have the effect of regulating.

Knowlton *vs.* Moore, 178 U. S. 41.

Though the Federal Government may not regulate a board of trade organized under a State law, it may tax the enjoyment of the privileges of such board of trade.

Nicol *vs.* Ames, 173 U. S. 509.

The subject of regulation of the canneries in Alaska has become a serious one. Congress has taken no steps in the matter. A faint attempt in that direction was made by the local Legislature in 1919 by the enactment of Chapter 59 of the laws of that year (Appendix D).

But this has proved inadequate, and the last Legislature passed the following Joint Resolution:

"SENATE JOINT RESOLUTION NO. 2.

IN THE LEGISLATURE OF THE TERRITORY OF ALASKA.

SEVENTH SESSION.

Be it resolved by the Senate and House of Representatives.

WHEREAS, at some canneries and salteries in the Territory, unsanitary conditions prevail and the

waters in the vicinity of many such establishments are often being polluted by offal deposited therein, which conditions are detrimental to the public in general and to the operators of the sanitary establishments in patricular; and

WHEREAS, housing facilities for the comforts of the employees as well as the moral atmosphere at many such establishments are often deplorable; and

WHEREAS, the contract system for the accomplishment of much of the labor thereat entail many abuses; and

WHEREAS, the enactment of effective laws to remedy these evils without injuring the conscientious operators involves many intricate problems,

Be it Resolved, That the Attorney General is hereby instructed to place himself in communication and conference with the United States Bureau of Fisheries and the principal canneries and salteries and to acquaint himself thoroughly with the situation referred to with a view of obtaining information enabling him to draft laws for the purpose of enforcing equitable, reasonable and effective rules and regulations at canneries, salteries and similar establishments for the purpose of abating the evils complained of and submit his recommendations with such bills for laws as he may find adequate and equitable to the next session of the Legislature."

Approved April 28, 1925.

SCOTT C. BONE,
Governor of Alaska.

Is all this beyond the power of the Legislature?

If it be not, it is because the Legislature has jurisdiction over the canning and salting industry.

But if such police jurisdiction exists, the objection to the present excise tax on the ground that it is regulatory must fall, for the police power may be exercised through the taxing power.

Hammond Packg. Co. *vs.* Montana, 233 U. S. 331.

If the Legislature has jurisdiction over the canneries, the courts will not pass upon the wisdom with which the jurisdiction is exerciesd.

III.

Classification by Amount.

The precise principle which petitioner relies upon to invalidate the tax here in question has proved extremely illusive. No statutory limitation upon the taxing power of the Territory is pointed out as transgressed, nor have any specific provisions of the Constitution been referred to as having been violated, unless it be the 5th and the 14th Amendments, which are casually alluded to in petitioner's brief.

Many of the cases cited by counsel as vindications of their contentions are decided under the equality clause of the 14th Amendment. But that Amendment is addressed to the States, not to the Territories, or to the Federal Government (Territory of Alaska *vs.* Troy, 258 U. S. 101, and Haavik *vs.* Alaska Packers Assn., 263 U. S. 510), and might, therefore, be disregarded without further consideration, but will, nevertheless, be referred to hereafter.

The 5th Amendment has often been invoked in this Court for protection against what has been thought unjust discrimination in tax levies, but without avail. In the recent

leading income-tax case, Brushaber *vs.* Union P. R. Co., 240 U. S. 1, this Court on this point said:

> "So far as the due process clause of the 5th amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution."

In the McCray case the Court said on this point:

> "Whilst undoubtedly both the 5th and the 10th amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts."

Nevertheless, although there be no constitutional prohibition enjoining equality and uniformity in the Federal tax measures, it is insisted that "classification by amounts" and a tax levy progressively increasing for each unit of measurement within such classification is beyond the power of Congress or its agency, the Territory, and as such void.

The fallacy of counsel's subtle argument may be exposed by an illustration taken from the decisions of this Court.

Suppose a tax had been levied upon the net income of the canneries and that such tax had been graded upwards so as to increase progressively with the increase of the income until fifty per centum of the income above one hundred thousand dollars had been absorbed by the Territory,

while only five per cent of the net income below twenty-five thousand is so absorbed. This is conceded to be legal.

But why is it legal?

Here we have one person with a plant worth ten thousand dollars permitted to earn over two hundred per cent on his investment, while another with plants worth some twenty million dollars is permitted to earn less than one per cent.

This may appeal to some as inequitable, but it is substantially what has been held by this Court to be valid legislation and has passed beyond the range of argument.

Counsel argue that this is legal because the tax is upon the profits and not upon the volume of business. In this they are demonstrably mistaken. The tax would be as valid were it levied upon the gross income (Spreckles Sugar Ref. Co. *vs.* McClain, 192 U. S. 397) and increased in geometrical ratio with the increase of the volume of the business. Such a tax would more certainly than a net income tax place a definite limit upon the volume of business. But no constitutional reason can be assigned why such a tax is not valid, even when levied by the Federal Government which possesses no police power over the industries.

All the arguments presented by counsel in the case at bar were presented to this Court in the case of Clark *vs.* Titusville, 184 U. S. 329, and were there decided against petitioner's contentions, notwithstanding the fact that in that case the equality clause of the 14th Amendment applied and was appealed to for protection against "classification by amounts."

It is conceded that the principle applied in the inheritance-tax cases and the income-tax case would dispose of the case before us in favor of respondent in event that principle were

applicable to the case at bar. It is therefore contended by counsel that it is not applicable.

To escape the logic of Knowlton *vs.* Moore counsel insist that the Federal inheritance tax was sustained on the theory that the Government had power to impose any conditions it saw fit upon the descent or devolution of property.

This is an error. The Federal Government has no authority to regulate succession. That power is confided to the States exclusively. The objection raised to the Federal inheritance tax was, first, that it was an interference with the States' exclusive right to regulate succession, and, second, that it was not uniform, that it undertook to classify according to degrees of consanguinity as well as according to amounts of inheritance and legacies and imposed a different rate of tax upon all of such different classes. Degree of consanguinity and amount of inheritance could form no legal basis for classification for the purpose of taxation, so it was argued.

In Knowlton *vs.* Moore, 178 U. S. 82, this court effectively and for all time disposed of both contentions. In the discussion of the inheritance tax the Court asked and answered this question:

> "Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of State legislation."

After a discussion of the problem the Court concludes:

> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists."

Coming to the next objection, viz: that the tax was not uniform and that the different rates were applied to arbitrary classifications which had no basis in any distinctions recognized by law, the Court held, that, though the criticisms of the law might be justified, the lack of uniformity complained of was in no manner repugnant to the Constitution. The only uniformity demanded by the Constitution, so said the Court, is "geographical uniformity" and the Court cannot add new restrictions upon the power of Congress to those already imposed by the Constitution.

It is also admitted that if the principle applied to the Federal income tax law also applies to the law involved in this case the petitioner is foreclosed by the ruling of this Court in Brushaber *vs.* Union P. R. Co., 240 U. S. 1.

Counsel undertake to brush this decision aside by a nonchalant assertion that the income tax is levied under a new amendment to the Constitution which confers new powers not applicable to the excise taxes.

But nothing could be much farther from the truth, as was

pointed out by Mr. Chief Justice White in the Brushaber case. The income tax is an excise levied under Sec. 8, Art. I, of the Constitution, the same as is any other Federal tax.

In discussing the effect of the 16th Amendment, and after quoting it, the Chief Justice said:

> "It is clear on the face of this text that it does not purport to confer power to levy income taxes in a general sense,—an authority already possessed and never questioned, or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment."

Having thus settled the subject that the income tax was imposed under the general authority to levy excises, the Court considered the complaints about arbitrary classifications and discriminations. These are enumerated on pages

21 to 24, inclusive, of the opinion. Referring to these complaints the Chief Justice, in passing, remarks:

> "Their want of legal merit is at once apparent since it is settled that the clause (No. 8, Art. 1) exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of."

After citing a number of authorities in support of this proposition the Court continues:

> "So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause."

Answering the argument that the inequalities and discriminations were so arbitrary as to demonstrate the tax is not primarily a revenue measure, but a police regulation, the Court said:

> "It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was im-

> posed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in Knowlton *v.* Moore, and the right to urge it was necessarily foreclosed by the ruling in that case made."

After citing leading decisions by this Court in support of the foregoing, the Chief Justice concludes:

> "In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing."

In the recent case of Stebbins *vs.* Riley, 268 U. S. 137, Mr. Justice Stone made the following decisive observation with reference to a state inheritance tax and the Federal Constitution.

> *"There is no constitutional guaranty of equality of taxation."* (Italics mine.)

It only remains to be observed that the progressive feature of the tax here in question is not nearly as galling, nor nearly as regulatory in its effect, as the progressive features of the inheritance tax or the income tax. As this tax is demonstrably levied under the same power which supports the inheritance tax and income tax, and as the Congress had no more regulatory authority over the subjects taxed than has the territorial Legislature over fisheries—even if petitioner's contention be correct, the rule of law which applies to one must apply to the other, unless at this point there exists an anomaly of the law.

But in Clark *vs.* Titusville, 184 U. S. 329, this Court held there is no such anomaly. That case involved the validity of a city ordinance which imposed a graduated license tax upon mercantile establishments. The classifications were based upon volume of business. The objections were that the differences were not in kind, but only in amount or value, and that the so-called classes are subdivisions without regard to a common ratio, either as between the several subdivisions or as between the members of the subdivisions.

In support of his contentions plaintiff invoked the equality clause of the 14th Amendment. The Court answered:

> "These objections are but the expressions of the effect of classifications by amount, and have been made before, and considered before by this Court, and the judgment has been adverse to the contention of plaintiff."

* * * * * * *

"Classification by amount came up for consideration and decision in Magoun *vs.* Illinois Trust & Sav. Bank, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention, and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion."

Referring to the equality rule of the Fourteenth Amendment, the Court said, quoting from Magoun *vs.* Ill. T. & S. B.: "That rule does not require, as we have heretofore seen, exact equality of taxation. It only requires that the law imposing it shall operate *on all alike under the same circumstances.*" (Italics mine.)

The language quoted from the leading inheritance tax case is repeated in Flint *vs.* Stone Tracy Co., 220 U. S. 108, where it is applied to the Federal "corporation tax"; in Patten *vs.* Brady, 184 U. S. 608, to the Federal tobacco tax; in Spreckles Sugar Ref. Co. *vs.* McClain, 192 U. S. 397, to the *gross* income tax on sugar; in Brushaber *vs.* Union P. R. Co., to the Federal income tax. It is evident the doctrine is intended to be of general application and not to be limited to inheritance and legacies.

It has already been shown that the equality clause of the 14th Amendment does not apply in Alaska. But even if it did the law here in question would be valid.

That the Amendment does not deprive the States of the usual right to classify persons and occupations for the purpose of taxation (*a*) by amounts or volume, or (*b*) by degree of relationship, or (*c*) by place of residence.

Magoun *vs.* Ill. Trust & Sav. Bank, 170 U. S. 283;
Maxwell *vs.* Bugbee, 250 U. S. 525.

Classification by amount was first adopted by Congress for Alaska by the Act of March 3, 1899 (Sec. 460, p. 1336, Stat. L. 30), imposing certain license taxes. That statute is still in force. The Legislature has applied the same system to bakeries, cold-storage plants, laundries, meat markets, mercantile establishments, mining and other industries. In these the volume of business is measured by the value of the transaction as a matter of convenience. (See Appendix C.) In each case the tax is upon "the plant." A person operating several establishments must pay a separate tax on each. One who operates a chain of stores pays on the basis of the business done at each store, the same as a canner pays on the basis of the business done at each cannery.

The *reasonableness* of the clasification of Salmon canneries by the statute under consideration is discussed in chapter V of this brief.

IV.

The Purpose of the Tax is Not a Matter for the Courts.

The fact that an excise is regulatory in its effect, and must be assumed to be intended to be so, does not invalidate it on the theory that it is an unauthorized exercise of the police power. That must be considered as settled, so far as the law here assailed is concerned, by the decision of this Court in Alaska Fish Salting and By-Products Co. *vs.* Smith, 255 U. S. 44, where this Court, construing the same kind of a law enacted under the power here involved, said:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to

> that end imposes a greater tax upon that part of plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to contravene a Constitution that has known protective tariffs for a hundred years."

Even where the equality clause of the 14th Amendment applies the same rule would hold good.

Rast *vs.* Van Deman, & L. Co., 240 U. S. 342.

In the inheritance-tax cases the taxes considered had very clearly the effect of regulating devolution of property by a progressively increased tax on the larger inheritances and legacies, but that constitutes no legal objection to the tax.

That the income tax has the effect of regulating incomes by discrimination against the larger incomes was vigorously asserted by those who assailed the law, but the point was not considered available as a ground for attack.

In Veazie Bank *vs.* Fenno, 8 Wall. 533, this Court held that an excise upon notes of State banks, which necessarily drove those notes out of circulation, did not invalidate the law as a revenue measure, even though it is not, and was not, and could not be, revenue-producing, and though it must be assumed that Congress purposed the natural consequences of its own acts.

In McCray *vs.* United States, 195 U. S. 27, this Court held that an excise upon colored oleomargarine forty times as high as upon uncolored oleomargarine was still only a tax, although it had the effect of putting a stop to the sale of oleomargarine in competition with butter, and although Congress must be deemed to have intended that effect.

In Flint *vs.* Stone Tracy Co., 220 U. S. 108, and Patton *vs.* Brady, 184 U. S. 608, the same rule was adhered to.

In United States *vs.* Doremus, 249 U. S. 86, the same doctrine was applied to the narcotic act.

In the last case the Court summarized the doctrines of its many previous decisions on this subject in the following language:

> *"The mere fact that part of its purpose, or perhaps its main purpose, is to promote some political, economic, social, or moral end, is not sufficient to render it unconstitutional in the courts."* (Italics mine.)

It can serve no purpose in this brief to reiterate the reasons assigned by this Court in the various cases heretofore decided, and where the Court has declined to review the wisdom, the expediency, the honesty or purpose of a tax law. From the authorities already cited it must be considered settled beyond argument that this Court will pass only upon the jurisdiction of the legislative department, but will decline to consider the question of whether that jurisdiction has been abused. On any other theory every "protective tariff" would be rendered void.

In the oleomargarine case this Court said:

> "It being thus demonstrated that the motive or purpose of Congress in adopting the act in question may not be inquired into, we are brought to consider the contentions relied upon to show that the act assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose of motive."

Answering the argument that a tax which is so excessive as to defeat its own purpose as a revenue measure must be considered in its nature purely regulatory and therefore beyond the power of Congress, the Court quotes the following excerpt from the opinion of Mr. Chief Justice Chase quoted in Spencer *vs.* Merchant, 125 U. S. 355:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom the members are elected."

Again, quoting from the McCray case:

> "The judicial power may not usurp the functions of the legislature in order to control that branch of the government in the performance of its lawful duties."

In Flint *vs.* Stone Tracy Co., this Court reiterated its former assertions that:

> "The limitation of (geographical) uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others."

And, again, in the same case:

> "As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States."

In the income-tax case (Brushaber *vs.* Union P. R. Co.) the Court said:

> *"It is true that it is elaborately insisted that though there is no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But * * * the right to urge it was necessarily foreclosed by the ruling in Knowlton vs. Moore."* (Italics mine.)

The doctrines of this Court on this subject is clearly set forth in the McCray case in the following language:

> "Even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

The child-labor case presented an entirely different situation. The act there considered did not even on its face purport to be a revenue measure. It was an open attempt at prescribing certain regulations for the conduct of certain industries, and the alleged tax was only a penalty for violating the regulations prescribed.

V.

The Reasonableness and Necessity of the Law.

Just as the executive department will serve any writ or process which on its face appears to be within the jurisdiction of the court whence it issued, so also do the courts enforce any statute which upon its face appears to be within the jurisdiction of the Legislature.

Until this Court undertakes to sit in judgment upon the honesty and intelligence of the Congress, until then will every attempt to give Congress jurisdiction to sit in judgment upon the wisdom of the decisions of this tribunal fail.

Yet counsel seem to think that the purpose of the members of the Legislature of Alaska in enacting a given statute is a question of fact which, upon issues joined, must be tried before and passed upon by a jury.

Counsel argues that because the allegations of improper motive set out in the complaint are demurred to they must be considered admitted. But it would seem elementary that a demurrer to an immaterial or frivolous allegation does not render it either material or pertinent. The statute must be left to speak for itself. It cannot be either aided or assailed by evidence aliunde. In the Alaska Fish Salting and By-products case this Court said:

"The acts must be judged by their contents, not by the allegations as to their purpose in the complaint."

Reasonableness of Classification.

That the grading of the tax so as to apparently fall heavier upon the owner of a cannery producing a large pack than upon the owner of one producing a small pack is just, and fair, and reasonable will appear upon reflection.

Salmon canning is a hazardous business. The "run" of salmon differs materially in the different places during the different seasons. No one can predict what the run will be. Yet preparation must be made for a "full" pack, which means the maximum capacity of the cannery. Now, the courts will take judicial notice that in the business of managing a salmon cannery in Alaska there is an irreducible minimum of expense which must be borne, regardless of the size of the pack. The larger the pack at any cannery the proportionately less charge enters into the cost of production per case. Of several canneries in various localities of the Territory each may be prepared for a pack of 100,000 cases, but one puts up 10,000 cases, another 30,000 cases, and a third 75,000 cases. As a result, the one with the small pack loses money, the one with 30,000 cases comes out even, and only the one with 75,000 cases or more makes a profit.

The gradation of the tax in proportion to the amount of the pack is a reasonable attempt at equalizing the burden.

Excess of Tax Over Requirements.

Section 9 of the Organic Act provides:

"Nor shall the Territory, or any municipal corporation therein, have power or authority to create or

> assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be *created or assumed in excess of actual income of the Territory municipality for that year,* including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness."

This means that unless the taxes for each year are sufficient to pay the running expenses, the governmental functions must come to a stop, because there is no authority to create any indebtedness beyond the current income. For this reason it is necessary for the Legislature to make sure that the appropriations do not exceed the revenues, or, to state this proposition inversely, to make sure the taxes collectible exceed the appropriations.

The court will take judicial notice that the Legislature of 1923 appropriated, by twenty separate public acts, a total of $1,655,307.93 out of the future revenues of the Territory for the two succeeding twelve months.

All the revenues of the Territory are raised by license taxes upon business. These are so very fluctuating, depending largely upon the run of salmon and the price of copper, that it is difficult to calculate in advance within twenty-five per cent what the revenues for a given year will be. If the decrease in the salmon run had continued at the rate of de-

crease during the six years prior to 1922, the income of the Territorial treasury would have been insufficient to meet the appropriations.

From the annual reports of the Bureau of Fisheries I submit the following data as to the amount of salmon packed in Alaska each year from 1917 to 1923, inclusive:

Year.	Total cases of all varieties.	Number of cases of Reds.
1917.....	5,947,286	2,488,381
1918.....	6,605,835	2,533,737
1919.....	4,583,688	1,277,661
1920.....	4,429,463	1,500,738
1921.....	2,596,826	1,765,798
1922.....	4,501,652	2,070,658
1923.....	5,035,697	1,859,496
1925, estimated.....	.....	1,003,000

If this table proves nothing else, it proves the uncertainty of the salmon pack as a source of revenue for the Territory.

In connection with what has already been pointed out, it should be noted that the increase or decrease is not uniform throughout the Territory, but some sections may have a big run while other sections during the same year may be almost total failures.

When counsel assert that the revenues produced by the law assailed were in excess of the needs of the Territory, it may be pointed out that for the last fifteen years the Congress has annually had to come to the rescue of the Territory by appropriations of from $400,000 to $1,000,000 for roads and trails and other internal improvements which the Territory was unable to provide. Failure to make appropriations exhausting all the prospective revenues was only due to caution to not incur expense beyond the income.

VI.

Uncertainty of the Word "Cannery."

It is claimed that the word "cannery" is so uncertain that it is impossible to state whether it is intended to apply to one building or to several buildings. The same objection might with equal justice be made to the tax on "meat markets," "laundries," "bakeries," "power plants," "telephone plants," "mercantile establishments," referred to in the tax law; but so far no difficulties have arisen over these designations save in the minds of counsel.

Obviously, the question is not before the Court, because in the complaint plaintiff alleges, in each count, that defendant at a certain place mentioned operated "a cannery" where a certain specific number of cases of each variety of salmon were canned. Defendant answers that this allegation is true; that at said place it did operate "a cannery" at which it packed the number of cases alleged. There is therefore nothing at issue on that point.

Respectfully submitted,

JOHN RUSTGARD,
Attorney General of Alaska,
Attorney for Respondent.

APPENDIX A.

Section 3 of Organic Act.

Section 3. That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

APPENDIX B.

Section 9 of Organic Act.

Section 9. The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July Thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall

be determined by the court upon the evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or any constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: Provided, That all authorized indebtedness shall be paid in the order of its creation; all taxes shall be uniform upon the same class of subjects and shall be levied and collected

under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum of the assessed valuation of the property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: Provided, That the Congress reserves the exclusive power for five years from the date of the approval of the Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void: Provided further, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

APPENDIX C.

Chapter 95, Laws of Alaska for 1923.

Section 1. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska between the 57th and 60th degrees of north latitude and east of 139th meridian west longitude from the tenth day of August to the first day of September in each year.

Section 2. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska south of the 57th degree of north latitude and east of 139th meridian from the 20th day of August to the 9th day of September in each year.

Section 3. That any person, firm or corporation violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof for each and every offense be punished by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in jail for not less than ten days nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

Section 4. This Act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska, or any Act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and acts of Congress shall be and remain in full force and effect. The purpose of this Act is not to alter, amend, modify or repeal any of such laws, but to provide for further and additional regulation of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof, and this Act shall be construed so as to carry out the intention herein expressed and not otherwise.

Section 5. An emergency is hereby declared to exist and this Act shall be in effect immediately upon its passage and approval.

Approved May 4, 1923.

APPENDIX D.

Chapter 59, Laws of Alaska for 1919.

Section 1. The office of Labor Commissioner of the Territory of Alaska is hereby created.

Section 2. The Mining Inspector of the Territory of Alaska shall be ex-officio Labor Commissioner, but shall receive no additional compensation for acting as such Labor Commissioner. The Mining Inspector is hereby empowered

and authorized to perform the duties, of such Labor Commissioner, as provided in this Act.

Section 3. The duties of the Labor Commissioner of the Territory of Alaska shall be:

(a) To assort, systematize and present in biennial report to the Governor of Alaska statistical details relating to all departments of labor in the Territory, especially in its relation to the industrial, social and sanitary conditions of the laboring classes, and to the permanent prosperity of the industries of the Territory.

(b) He shall have the power to enforce all sanitary and safety regulations, as are hereinafter set forth.

(c) He may inspect any factory, cannery or other establishment where labor is employed, and is hereby empowered and authorized so to do.

Section 4. In every factory, cannery or other establishment where labor is employed, all refuse, waste and sweepings shall be removed or disposed of at least once a day and in such a manner as not to become a nuisance. In every factory, cannery or other establishment in which any process is carried on which makes the floors wet, the floors shall be constructed and maintained with due regard to the health of employees, and grating or dry-standing rooms shall be provided if practicable, at points where employees are regularly stationed, and adequate means shall be provided for drainage and for preventing seepage or leakage to the floors below.

Section 5. In every factory, cannery, or other establishment where labor is employed, there shall be provided a sufficient supply of clean and pure drinking water; if such drinking water is placed in receptacles, such receptacles shall be properly covered to prevent contamination, and shall be thoroughly cleaned at frequent intervals. There shall be provided and maintained suitable and convenient washrooms, separate for each sex, adequately equipped with washing facilities, consisting of sinks or stationary basins provided with running water, or with tanks holding an adequate supply of

clean water. And there shall be provided in every factory, cannery or other establishment employing ten (10) or more persons, shower baths with a sufficient supply of hot and cold water. All wash-rooms, washing facilities and sleeping quarters (when furnished by employer), shall be constructed, lighted, heated, ventilated, arranged and maintained according to rules and regulations drawn up by the Labor Commissioner.

Section 6. Every factory, cannery or other establishment, where labor is employed, shall be provided with a sufficient number of water-closets, earth closets, or privies, within reasonable access of the persons employed therein, and such water-closets, earth closets or privies shall be supplied in the proportion of at least one (1) to every twenty-five (25) female persons, and one (1) to every thirty (30) male persons; and whenever both male and female persons are employed, said water-closets and privies shall be provided separate and apart for the use of each sex, and plainly marked by which sex they are to be used; and no person or persons shall be allowed to use the closets or privies assigned to the opposite sex; and such closets or privies shall be constructed in an approved manner and properly enclosed, and at all times kept in a clean and sanitary condition.

Section 7. In every factory, cannery or other establishment, when labor is employed, adequate measure shall be taken for securing and maintaining a reasonable, and as far as possible, equable temperature, consistent with the reasonable requirements of the manufacturing process.

Section 8. It shall be the duty of every employer of labor, his superintendent, manager, or agent, in this Territory to afford to the Labor Commissioner, every facility for the inspection of his factory, cannery or other establishment, where labor is employed, and for procuring statistics of the wages and conditions of his employees.

Section 9. Any person, firm or corporation, or any agent, manager, or superintendent of any person, firm or corporation, who shall, for himself or such person, firm or corpora-

tion, violate any of the provisions of this Act, or omits or fails to comply with any of the requirements of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished, for the first offense, by a fine of not less than twenty-five ($25) dollars, nor more than fifty ($50) dollars, or by 10 days' imprisonment in the Federal jail or by both such fine and imprisonment; and upon conviction of a second or subsequent offense he shall be fined not less than one hundred ($100) dollars, nor more than two hundred ($200) dollars, or by imprisonment for one (1) month in the Federal jail or by both such fine and imprisonment.

Section 10. An emergency is declared to exist and this Act shall go in effect and be in full force on and after June 1st, 1919.

APPENDIX E.

Tax Law of Alaska.

COMPILATION

of Chapter 31, Session Laws of Alaska, 1921, entitled

AN ACT

To establish a system of license taxation, to provide for the collection thereof and to provide punishment for doing business without a license, and declaring an emergency, as amended by Act of May 5, 1923 (Chapter 101, Session Laws of 1923).

Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Any person, firm, or corporation prosecuting or attempting to prosecute, any of the following lines of business, or who shall employ any of the following appliances, in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business and appliances, as follows:

As amended by Chapter 101, Session Laws 1923.

"1st: (*a*) Attorneys-at-law, chiropractors, and doctors, including persons practicing medicine, surgery or osteopathy, ten ($10.00) dollars per annum. Each member of a firm shall be liable for this tax.

"(*b*) Optometrists, fifteen ($15.00) dollars per annum.

"(*c*) Dentists, twenty-five ($25.00) dollars per annum. Each member of a firm shall be liable for this tax.

"(*d*) Undertakers Ten Dollars ($10.00) per annum.

"2nd: (*a*) Automobiles for pleasure or family use and delivery cars used for private delivery and not for hire, ten ($10.00) dollars per annum.

"(*b*) Automobiles for hire and trucks, fifteen ($15.00) dollars per annum; the treasurer of the Territory to furnish to each licensee a license metal tag, which shall be placed on each truck, car or automobile, by the owner, for which a license is issued, under such regulations as the treasurer shall make.

"3rd: Bakeries doing a business in excess of three thousand ($3,000) dollars and less than five thousand ($5,000.00) dollars shall pay a license of five ($5.00) dollars per annum, and those doing a business in excess of five thousand ($5,000.00) dollars shall pay an additional five ($5.00) dollars per annum for each five thousand ($5,000) dollars' worth of business, or fraction thereof, done annually.

"4th: Electric light and power plants, selling light, power or steam for heat and supplies to the public, one-half of one per cent of the gross receipts in excess of twenty-five hundred ($2,500.00) dollars per annum from light, power and steam sold; one-half of one per cent of the net profits from supplies sold; but this tax shall not apply to plants owned by municipalities.

"5th: Telephone companies, one-half of one per cent of gross receipts in excess of fifteen hundred ($1,500) dollars per annum; but this tax shall not apply to plants owned by municipalities.

"6th: Water-works selling water or power to the public,

one-half of one per cent of gross receipts in excess of twenty-five hundred ($2,500.00) dollars per annum; but this tax shall not apply to plants owned by municipalities.

"7th: Employment agencies, operating for hire and collecting a fee for services, five hundred ($500.00) dollars per annum.

"8th: FISHERIES:

"(*a*) Clam canneries, three (3) cents per case.

"(*b*) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.

"(*c*) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000) ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000) fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(*d*) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(*e*) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(*f*) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that

no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other territorial taxes paid.

"(*g*) SALTERIES: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild-cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(*h*) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(*i*) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(*j*) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(*k*) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term "fisherman" shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924.

"9th: COLD STORAGE PLANTS:

"Doing a business of one hundred thousand ($100,000.00) dollars per annum or more, five hundred ($500.00) dollars per annum; doing a business of seventy-five thousand ($75,000.00) dollars per annum and less than one hundred thousand ($100,000.00) dollars, three hundred seventy-five ($375.00) dollars per annum; doing business of fifty thousand ($50,000.00) dollars and less than seventy-five thousand ($75,000.00) dollars per annum, two hundred fifty ($250.00) dollars per annum; doing business of twenty-five thousand ($25,000.00) dollars and less than fifty thousand

($50,000.00) dollars per annum, one hundred twenty-five ($125.00) dollars per annum; doing business of ten thousand ($10,000.00) dollars and less than twenty-five thousand ($25,000.00) dollars per annum, fifty ($50.00) dollars per annum; doing business of four thousand ($4,000.00) dollars per annum and less than ten thousand ($10,000.00) dollars per annum, twenty-five ($25.00) dollars; doing business under four thousand ($4,000.00) dollars per annum, ten ($10.00) dollars per annum.

"The 'annual business' under this subdivision shall be considered the gross amount received for the product and for storage of produce for others.

"10th: Fish buyers (dealers in fresh fish), one-tenth of one per cent per pound on fish purchased, except for sale at retail, whether or not the fish buyer operated a cold storage plant.

"11th: (*a*) Fish oil works and fertilizer plants, forty (40) cents per fifty (50) gallon barrel for oil and forty (40) cents per ton for fertilizers and fish meal.

"(*b*) Whale oil, fifty (50) cents per fifty (50) gallon barrel for oil, and fifty (50) cents per ton for fertilizer.

"12th: LAUNDRIES:

"Doing business of over two thousand ($2,000.00) dollars and less than five thousand ($5,000.00) dollars per annum, twenty-five ($25.00) dollars per annum; doing business of five thousand ($5,000.00) dollars or more and less than ten thousand ($10,000.00) dollars per annum, fifty ($50.00) dollars per annum; doing business of ten thousand ($10,000.00) dollars or more per annum, seventy-five ($75.00) dollars per annum.

"13th: MEAT MARKETS:

"Meat Markets doing a business of not less than ten thousand ($10,000.00) dollars nor more than twenty-five thousand ($25,000.00) dollars per annum, fifty ($50.00) dollars

per annum, doing business of not less than twenty-five thousand ($25,000.00) dollars nor more than fifty thousand ($50,000.00) dollars per annum, one hundred twenty-five ($125.00) dollars per annum; doing business of not less than fifty thousand ($50,000.00) dollars nor more than seventy-five thousand ($75,000.00) dollars per annum, two hundred fifty ($250.00) dollars per annum; doing business of not less than seventy-five thousand ($75,000.00) dollars nor more than one hundred thousand dollars ($100,000.00) per annum, three hundred seventy-five ($375.00) dollars per annum; doing business of more than one hundred thousand ($100,000.00) dollars per annum, five hundred ($500.00) dollars per annum; and fifty ($50.00) dollars additional for each twenty thousand ($20,000.00) dollars' worth of business done in excess of one hundred thousand ($100,000.00) dollars per annum; *Provided*, That the sum required to be paid for a license for prosecuting the business of a meat market under the provisions of Section 2569 of the Compiled Laws shall be deducted from the amount of tax due under the provisions of this subdivision.

"14th. Mercantile Establishments, other than exclusively wholesale mercantile establishments, doing business of more than one hundred thousand ($100,000.00) dollars per annum, fifty ($50.00) dollars per annum on each twenty thousand ($20,000.00) dollars' worth of business done in excess of one hundred thousand ($100,000.00) dollars.

"15th: MINING: One per cent on the net income in excess of ten thousand ($10,000) dollars and not in excess of five hundred thousand ($500,000) dollars, and on all net income in excess of five hundred thousand ($500,000) dollars and not in excess of one million ($1,000,000) dollars, one and one-half per cent (1½%); and on all net income in excess of one million ($1,000,000) dollars, one and three-fourths (1¾%) per cent.

"By 'net income' is meant the cash value of the output of the mine less operating expenses, repairs and betterments ac-

tually made, and royalties actually paid, and all taxes paid under Section 2569 of the Compiled Laws of Alaska; *Provided*, That the lessor of any mine operated under a lease shall be deemed to be engaged in mining within the provisions of this act and the royalties, less the cost of collecting the same, received by him, shall be deemed to be the net income within the provisions of this act; but where he receives royalties from more than one mining property he shall pay the tax on the aggregate income over five thousand dollars ($5,000.00). No deduction shall be made on account of depreciation of machinery, interest on bonds or money borrowed, or other taxes paid.

"By 'Mining' is meant any operation by which valuable metals, ores, minerals, asbestos, gypsum and marketable earth or stone is extracted from the earth.

"16th: Oil Wells: One cent per barrel in excess of five thousand (5,000) barrels from each well per annum.

"17th: Public Messengers: Twenty-five ($25.00) dollars per annum.

"18th: Ships and Shipping, Freight and Transportation: Ocean and coast-wide vessels doing business for hire and plying in Alaska waters, registered in Alaska and not registered elsewhere in the United States and not paying a tax or license elsewhere, and freight and passenger lines propelled by mechanical power, registered in the Territory of Alaska, and not paying a license or tax elsewhere in the United States, and river and lake steamers and barges, as well as transportation lines doing business wholly within the Territory of Alaska; one dollar per ton on net tonnage, custom house measurement of such vessel.

"19th: Dealers in non-alcoholic beverages, ten ($10.00) dollars per annum.

"20th: Manufacturing and repair shops, not otherwise listed as taxable, employing less than three men, exclusive of owner or proprietor, ten ($10.00) dollars per annum; employing three to ten men, twenty-five ($25.00) dollars

per annum; employing ten men or more, fifty ($50.00) dollars per annum.

"21st: Saw-mills (lumber mills and shingle mills), five (5) cents per thousand for shingles, and ten (10) cents per thousand feet, board measure, of lumber per annum."

Section 2. Every person, firm or corporation desiring to engage in any of the lines of business or employ the appliances specified in Section 1 shall first apply for and obtain from the Territorial Treasurer a license so to do. If the tax for the license applied for is a fixed one, the amount of such license tax shall accompany the application. If the amount of the tax is not a fixed sum, the applicant shall state in his application that he agrees to pay the license tax and will make a true return and will pay to the Treasurer such tax on or before the fifteenth of the next ensuing January.

The applicant shall also state the name of the person, firm or corporation making the application; the line of business to be licensed and the place where said business will be carried on. Upon the receipt of the application in proper form, the Treasurer shall issue the license as of the date of the application, and the applicant may carry on the business from and after the date the application was actually made.

Section 3. All license taxes, except those where the tax is a fixed one, shall be due and payable on December 31st of each year and must be paid on or before January 15th following; *Provided,* That the Treasurer shall have the power to extend such time until the fifteenth of the next ensuing March upon the special showing made by the licensee that such extension is necessary in order to enable him to ascertain the amount of taxes due, and it shall be the duty of the person, firm or corporation engaged in any of said lines of business to make a return under oath to the Treasurer on or before January fifteenth of each year, or, in case of an extension as above provided, on or before March fifteenth, setting forth the name of the licensee, the number of the license, and all the facts regarding the business necessary

to enable the Treasurer to determine the amount of the tax to be paid, and all applications for renewals of such licenses shall be made on or before January fifteenth of the calendar year for which such renewal is made.

In the event the tax is not paid before delinquency, as provided for by this section, a penalty of ten per centum of such tax shall be added, and such tax with such penalty shall draw interest at the rate of twelve per centum per annum until paid; *Provided,* That any person, firm or corporation engaged in or about to engage in mining, may designate in his application for a license the last day of any month in the year as the day of the closing of his fiscal year, and shall be entitled to have the tax payable by such person, firm or corporation computed upon the basis of the net income ascertained as herein provided for the full year ending on the day so designated in the year preceding the date when the tax is due, instead of upon the basis of the net income of the calendar year preceding the date when the tax is due.

Section 4. Any person, co-partnership or corporation, who shall prosecute or attempt to prosecute any of the businesses above enumerated, or shall employ any of the appliances above enumerated, without first having a license so to do issued under this Act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment in the jail not to exceed three months, or by both such fine and imprisonment; provided, however, that any such person, co-partnership or corporation who shall have for the year 1921 procured a license for any business or appliance under and pursuant to the provisions of Chapter 33 of the Laws of 1919, whereon a fixed tax is payable at the time the application for the license is made, shall not be required to take out or procure another license for the same business or appliance under this Act until after such license, issued under the Act of 1919, has expired. And provided, further, that

each month or fraction of month in which the business is prosecuted or appliance is used in violation of this Act shall be deemed a separate offense.

Section 5. Every licensee or other person prosecuting or attempting to prosecute a business upon which the amount of the license tax under this Act is based on the amount of the business transacted or on the profit of such business, shall keep in permanent form at his, their or its principal place of business, within the Territory, correct accounts of the business transactions in such a manner as to readily disclose, upon examination of such accounts, the amount of the tax due the Territory. The Auditor, if such officer shall function, otherwise the Treasurer, shall have authority to promulgate rules and regulations for the making and keeping of such records, and when such rules and regulations are so promulgated they shall be followed by the licensees. The records herein provided for, as well as the premises where the business is prosecuted, shall be open at all reasonable times to the inspection by the Treasurer of the Territory, or by anyone whom the Treasurer shall in writing delegate for that person [purpose], or by the Attorney General, or anyone whom he shall in writing delegate for that purpose; provided, however, that no information acquired by any such officials or their representatives in the examination of the records of any such person, co-partnership or corporation, shall be used or competent for use except in proceedings to prosecute offenses under this Act, or in proceedings to collect the tax under this Act; and it shall be unlawful to disclose such information, so acquired, except for the purpose above stated.

Section 6. In event any licensee shall fail or refuse to make and keep such accounts as provided for in the foregoing section, or shall refuse to permit such books, records and accounts or premises to be so inspected, as above provided for, the Auditor of the Territory, if such officer functions, otherwise the Treasurer of the Territory, shall estimate

the amount of the tax due from such information as he may have or such facts as may come to his knowledge; and such estimate, arrived at by the Auditor or Treasurer, shall be accepted and treated as conclusively correct, and the licensee shall be liable for such amount as the tax under this Act: provided, however, that in the appropriate proceedings, the District Court shall have authority and it shall be its duty by the proper order to direct the licensee or such other persons as prosecute the business upon which the tax is levied by this Act, to exhibit to the said officials above mentioned, or their representatives, the books of account, vouchers and other records kept by such licensee or other person above referred to, and enforce such order in the usual manner.

Section 7. Any person, co-partnership or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be punished by a fine or imprisonment, as above provided; and prosecutions for violations of any of the provisions of this Act may be by information filed by the Attorney General or other authorized legal counsel for the Territory, in any court of competent jurisdiction. Where the prosecution is had for failure of a licensee or other person to remit accrued tax, based upon the amount of business transacted or profit made, the fine imposed shall not be less than the amount of the tax, with the penalty and interest, as well as the costs of the prosecution, and such judgment shall be a prior, paramount and superior lien on all of the defendant's property in the Territory; *Provided, however,* That in any prosecution under the terms of this act, no person otherwise competent as a witness, shall be privileged from testifying on the ground that his testimony may incriminate him, and no officer or agent of any corporation shall be privileged from testifying on the ground that his testimony may incriminate such corporation; but no indictment or prosecution shall afterwards be brought against such witness on account of any offense or transaction concerning which

he testified as a witness, nor shall any indictment or prosecution be afterwards brought against any corporation on account of any offense or transaction concerning which any officer or agent of such corporation is compelled to testify as a witness; *Provided, further,* That in any prosecution hereunder, the Attorney General, or other authorized legal counsel of the Territory, may, with the consent of the Governor, compromise the case by accepting from the defendant a sum not less than the tax, legal interest thereon, and all costs and expenses.

Section 8. It shall be the duty of the Attorney General or other authorized legal counsel of the Territory to enforce the provisions of this Act, and for that purpose he may, with the approval of the Governor, employ such assistants as he may deem necessary, but the compensation for services of such assistants shall be paid out of the fund recovered, and the Territory shall not be liable therefor in any event beyond fifteen (15) per cent of the amount so recovered in each case; assistant counsel may, however, be employed at a previously agreed upon and stipulated fixed fee.

Section 9. Special remedies provided by this act, or other acts of the Legislature, shall not be deemed exclusive, and any appropriate remedy, either civil or criminal, or both, may be invoked by the Territory in the collection of all taxes, and enforcement of the tax lien.

Section 10. All taxes levied, laid or provided in this Act, and the penalties and interest accrued, are hereby declared to be a lien, prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the various industries or lines of business upon which a license tax is levied by this Act.

As amended by Chapter 101, Session Laws 1923.

Section 11. It shall be the duty of the United States marshals and deputy marshals in the Territory of Alaska to enforce the provisions of this Act in their respective precincts, districts or divisions, and to report all violations thereof to the Governor, and under his direction file information, or take such proceedings as he may direct; and for the services so performed they shall be paid under the provisions of Section 3 hereof. And, for all negligence or willful failure to perform such duties, marshals and deputy marshals shall be liable to the Territory for all losses sustained, which liabilities may be enforced in any appropriate proceeding.

Section 12. The Auditor, if such officer functions, otherwise the Treasurer, of the Territory is authorized and directed to prescribe suitable forms of applications, licenses, returns and other such forms as may be necessary or proper to carry this law into effect. He shall distribute such forms to the public through the clerks of the court or marshal's office in the several divisions for the use of those subject to the taxes herein laid.

Section 13. Chapter 33 of the Session Laws of 1919 is hereby repealed, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the provisions of any of the acts hereby repealed; but all such taxes, penalties and interest shall be paid, collected and enforced in the same manner as taxes herein provided for are collected and enforced.

Section 14. Except as otherwise provided in this Act, all licenses shall be issued for the calendar year, beginning on January 1st and ending on December 31st of each year, and where the tax is not a fixed sum, but is computed after the close of the year's business, it shall be computed on the basis of the business done during such calendar year, and all taxes for the current year shall be calculated upon the basis of the schedule adopted by this Act.

Section 15. An emergency is hereby declared to exist, and this Act shall take effect from and after its passage and approval.

Approved May 5, 1921.
Amendment approved May 5, 1923.

(8132)

SUPREME COURT OF THE UNITED STATES.

No. 246.—October Term, 1925.

Pacific American Fisheries, Petitioner, *vs.* Territory of Alaska.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 7, 1925.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Territory of Alaska to recover from the petitioner, Pacific American Fisheries, license taxes alleged to be due upon cases of salmon packed by the defendant at four canneries named. The defendant in its answer set up that the territorial taxing act was contrary to the Act of Congress of August 24, 1912, c. 387, (§ 3,) 37 Stat. 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. The Territory demurred; there was a judgment for the plaintiff and this was affirmed by the Circuit Court of Appeals. 2 Fed. Rep. (2d) 9. A writ of certiorari was granted by this Court. 267 U. S. 589.

The taxes in question were imposed by c. 101, § 2, subdivision 8th, Laws of Alaska, 1923, amending c. 31 of the Laws of 1921. By (*c*) of that subdivision salmon canneries, after a tax by (*b*) of ten cents per case, are charged an additional tax on a pack of kings, reds and sockeyes, counted together, at any one cannery, as follows: On all cases in excess of ten thousand and not more than twenty-five thousand, five cents per case; in excess of twenty-five thousand and not more than forty thousand, ten cents per case; in excess of forty thousand and not more than fifty thousand, fifteen cents per case; and on all in excess of fifty thousand, twenty cents per case. Similarly in (*d*) and (*e*) a tax of four and one-half cents per case is imposed on medium reds, cohoes, and pinks; with additional taxes for each increase of numbers as in the previous subdivision. By (*f*) chums are taxed three cents per case. The

petitioner says that this graduated tax is inconsistent with the Act of Congress mentioned, which provides that the authority therein granted to alter, amend, modify and repeal laws in force in Alaska should not extend to the game, fish and fur seal laws, and presses this contention notwithstanding the further proviso that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. The petitioner also says that the classification upon which the surtax is based is unreasonable and a denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States. No question is raised about the uniform tax of ten cents per case imposed by (*b*). That has been paid.

The petitioner offers various reasons to show that this tax is not what it purports to be but is an attempt to regulate fisheries, which, the petitioner believes, Congress has not given the Territory power to regulate. The answer alleges that it was known that the revenue from these taxes would exceed the appropriations and needs of the Territory, and from this and other things the conclusion is drawn that the taxes were levied with the intent of driving the defendant out of its business. But the premise could not be known, it only could be prophesied. If known the conclusion as to legislative intent would not follow; and if the intent were entertained, in the only sense in which it rationally could be imputed, that is, to discourage canning the larger amounts, the legislature lawfully might act with that intent. Fisheries were not the direct object of attack, but canneries. It would require a strong case in any event to invalidate a tax on things that the legislature had power to regulate because of its collateral reaction on something else. But here even as to fisheries the legislature is given power to tax. Any tax is a discouragement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a shortsighted rush for fish. At least we must take it to be clear that the unlimited power expressly given may be exercised with consideration of collateral advantages and disadvantages. *Alaska Fish Salting and By-Products Co.* v. *Smith,* 255 U. S. 44, 48. It could not be exercised intelligently otherwise. The extent of the

power is a question of specific interpretation not of general principle; and therefore we leave the many familiar cases that were cited, on one side.

It is not unworthy of notice that in § 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, c. 818, § 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of game and fish is recognized, and also that the latest revision of the fish law by Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction with the way in which those powers had been used. Act of June 6, 1924, c. 272, § 8; 43 Stat. 464, 467.

It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially as contravening the Fifth Amendment and denying due process of law. Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its full capacity; that there always will be an irreducible minimum of expense to be borne whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law justly may attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.